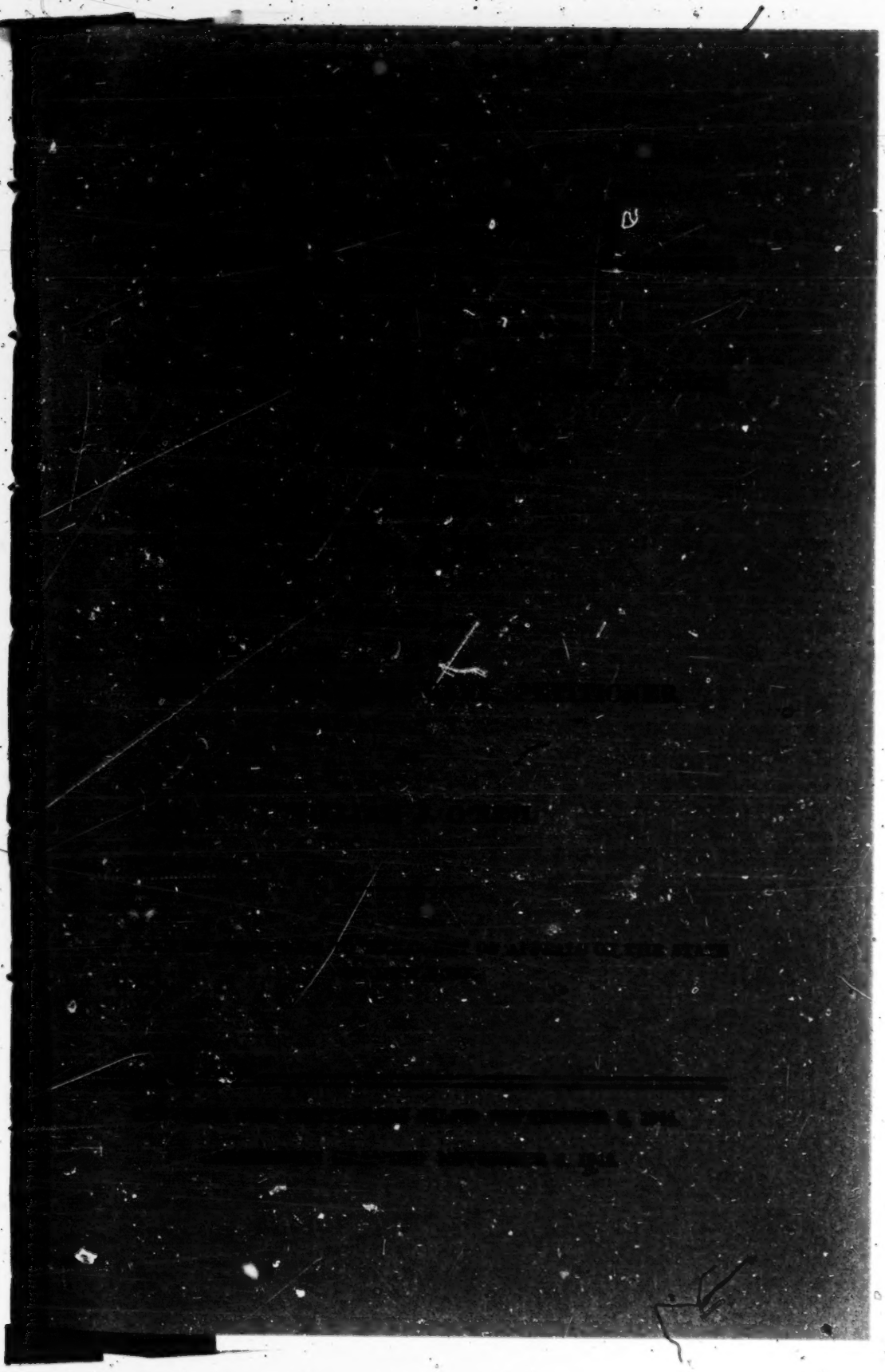

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 445

BROOKLYN SAVINGS BANK, PETITIONER,

vs.

WILLIAM J. O'NEIL

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Respondent,

against

BROOKLYN SAVINGS BANK, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced by the service of a summons and complaint on or about the 6th day of February 1943.

Issue was joined by the service of an answer on or about the 11th day of February 1943. The action was tried before the Hon. William T. Keleher without a jury on the 15th day of March 1943 and the Court dismissed the complaint without an Opinion.

The case was then appealed to the Appellate Term of the Supreme Court First Department, which by order entered the 10th day of June 1943 reversed the determination of the Municipal Court with $30 costs and directed judgment in favor of the plaintiff for $623.16 with interest on $423.16 from August 30, 1940 and costs.

The Appellate Term by order dated July 7, 1943 granted leave to appeal to the Appellate Division First Department and on August 5, 1943 the Defendant-Appellant served and filed notice of appeal to the Appellate Division. [fol. 2] The name of the original plaintiff is William J. O'Neil.

The name of the original defendant is The Brooklyn Savings Bank.

The Plaintiff's attorneys until after the determination of the Appellate Term were Stein, Solomon & Simon, but by stipulation dated August 9, 1943 Max R. Simon of 225 West 34th Street, New York City, was substituted as attorney for the plaintiff.

Defendant's attorneys are Snedeker & Snedeker, 164 Montague Street, Brooklyn, New York.

There has been no change of parties or attorneys herein except as above stated.

In Municipal Court of the City of New York, Borough of Manhattan, First District

William J. O'Neil, Plaintiff,

against

Brooklyn Savings Bank, Defendant

Notice of Appeal to Appellate Term

Sirs:

Please take notice, that the plaintiff William J. O'Neil herewith appeals to the Appellate Term of the Supreme Court in and for the First Judicial Department from a [fol. 3] judgment entered in the within entitled action in the office of the Clerk of this Court on the 16th day of March, 1943, awarding costs to the defendant herein in the sum of $41.00 and dismissing the complaint herein,—as well as from each and every part thereof.

Dated, New York, March 18, 1943.

Yours, etc., Stein, Solomon & Simon, Attorneys for Plaintiff, Office & P. O. Address, 225 West 34th Street, Borough of Manhattan, City of New York.

To: Snedeker & Snedeker, Esqs., Attorneys for Defendant, 164 Montague Street, Brooklyn, New York.

[fol. 4] In Municipal Court of the City of New York, Borough of Manhattan, First District

Plaintiff's Address, 203 East 77th Street, Borough of Manhattan.

Classification No. B 27

William J. O'Neil, Plaintiff,

against

Brooklyn Savings Bank, Defendant

Summons

To the above named Defendant:

You are hereby summoned to appear in this action in the Municipal Court of the City of New York, Borough of

Manhattan, First District, before the Clerk of the said Court, at his office at 8 Reade Street, in the Borough of Manhattan, in the City of New York, within five days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; and if you fail to make answer, judgment will be taken against you for the sum of $673.16 with interest thereon from the 1st day of September, 1940, together with the costs of this action.

Dated, New York City, the 4th day of February, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff, Office & P. O. Address, 225 West 34th Street, Borough of Manhattan, New York City.

[fol. 5] In Municipal Court of City of New York

[Same Title]

Complaint

Plaintiff, complaining of the defendant, by Stein, Solomon & Simon, his attorneys, respectfully shows to this Court and alleges:

First: That at all the times hereinafter mentioned plaintiff was and still is a resident of the Borough of Manhattan, City and State of New York.

Second: That at all the times hereinafter mentioned, the defendant, a domestic corporation, was and still is the owner of the loft building and premises known as and located at No. 443 Fourth Avenue, Borough of Manhattan, City of New York.

Third: That plaintiff was employed by and on behalf of the defendant as a night watchman at, and for, the aforementioned loft building at 443 Fourth Avenue, Borough of Manhattan, City of New York, from the month of September, 1938 up to and including the month of August, 1940.

Fourth: Upon information and belief, that during the entire period of plaintiff's employment herein, some or many of the tenants or occupants in said loft building were engaged in interstate commerce or were engaged in the production of goods for interstate commerce.

Fifth: That the duties or services required to be performed by plaintiff, and actually performed by him during the course of his employment herein, were such as were necessary to the production of goods for interstate com- [fol. 6] merce by the tenants or occupants of said loft building, or were necessary to their engaging in interstate commerce.

Sixth: That each and every week of his employment herein, plaintiff was required to work, and actually did work, at least fifteen (15) hours in excess of the maximum weekly number of hours permitted and prescribed by the United States Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Sections 201 et seq.

Seventh: That, in violation of Sections 7 and 16 of the said Fair Labor Standards Act of 1938, plaintiff never received any overtime compensation from the defendant herein, or from anyone else, each week as the same became due, owing and payable, for the number of hours he worked each week in excess of the maximum therein permitted and prescribed.

Eighth: That the total amount of overtime compensation earned by the plaintiff during the course of his employment herein, was the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars. Said sum represents overtime compensation based upon a rate equal to one and one-half (1½) times the regular rate at which plaintiff was employed herein.

Ninth: That sometime after the expiration of plaintiff's employment herein, the defendant did pay to the plaintiff the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars as overtime compensation herein, although as has been hereinbefore set forth, it had failed, neglected and refused to pay plaintiff the particular sum earned by him as such overtime compensation each week as the same became due, owing and payable.

[fol. 7] Tenth: That by virtue of the foregoing, and particularly because of the failure of the defendant to pay the required overtime compensation to the plaintiff each week as the same became due, owing and payable, there is now due and owing to the plaintiff from the defendant, by virtue of Section 16 of the said Fair Labor Standards

Act of 1938, an additional sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars as liquidated damages, —no part of which has been paid although duly demanded.

Eleventh: That by virtue of the foregoing and in accordance with Sections 7 and 16 of the Fair Labor Standards Act of 1938, there is also now due and owing from the defendant to the plaintiff the sum of Two Hundred Fifty ($250.00) Dollars as and for reasonable attorney's fees herein.

Wherefore, plaintiff demands judgment against the defendant in the sum of Four Hundred Twenty-three and 16/100 ($423.16) Dollars, with interest from the 1st day of September, 1940, together with the costs and disbursements of this action, and further respectfully prays that this Court award and allow to his attorneys herein, in addition, the sum of Two Hundred Fifty ($250.00) Dollars as and for reasonable attorney's fees to be paid by the defendant.

Stein, Solomon & Simon, Attorneys for Plaintiff,
Office & P. O. Address, 225 West 34th Street,
Borough of Manhattan, City of New York.

[fol. 8] In Municipal Court of City of New York

[Same Title]

Answer

Defendant The Brooklyn Savings Bank, by Snedeker and Snedeker, its attorneys, answers the complaint herein as follows:

1. Defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, or any of them, contained in the paragraphs of the complaint numbered, First, Fourth, Fifth or Sixth, or in either of them.

2. Defendant denies each and every allegation contained in the paragraphs of the complaint numbered Seventh, Eighth, Tenth and Eleventh, or in either of them.

3. Defendant denies each and every allegation contained in paragraphs of the complaint numbered Second, except

that the defendant, a domestic corporation, has owned the building and premises known as and located at No. 443 Fourth Avenue, Borough of Manhattan, City of New York, since July 24, 1941.

4. Defendant denies each and every allegation contained in paragraph of the complaint numbered Third, except that plaintiff was employed by and on behalf of the defendant as a night watchman at and for the building 443 Fourth Avenue, Borough of Manhattan, City of New York from November 5, 1938 to and including August 30, 1940.

[fol. 9] 5. Defendant denies each and every allegation contained in paragraph of the complaint numbered Ninth except that at some time after the expiration of plaintiff's employment defendant did pay to the plaintiff the sum of $423.16.

For a first separate and complete defense defendant alleges:

6. That on or about the 13th day of November, 1942 and subsequent to the termination of plaintiff's employment by or on behalf of the defendant and prior to the commencement of this action plaintiff and defendant agreed that in consideration of the sum of $427.43 (less the sum of $4.27 Social Security deduction) to be paid by defendant to plaintiff that plaintiff would release and discharge the defendant from any and all claims for overtime employment, debts, damages, or liabilities arising out of or in connection with any claims of the plaintiff of any kind or character whatsoever growing out of overtime employment, under or by virtue of the Fair Labor Standards Act; and that thereupon and in pursuance of said agreement the plaintiff executed and delivered to the defendant a release in writing (a true copy of which is annexed hereto, marked Exhibit A) and that simultaneously with the execution and delivery of said release the defendant did pay to the plaintiff the aforesaid sum of $427.43 (less the sum of $4.27 retained as aforesaid for Social Security).

7. That by the execution and delivery of said release and the payment to and acceptance by the plaintiff of the aforesaid sum of money as set forth in the next preceding [fol. 10] paragraph the plaintiff did release and discharge the defendant from any and all claims, debts, damages, or

liabilities arising out of or in connection with any claims of the plaintiff of any kind or character whatsoever growing out of any overtime employment of the plaintiff by or on behalf of the defendant mentioned in the complaint herein.

For a second and partial defense defendant alleges:

8. If it be held herein that plaintiff is entitled to recover liquidated damages and an attorney's fee under Section 16-B of the Fair Labor Standards Act, then such application of said Act or said Section thereof would be and is unconstitutional under the Fifth Amendment to the Constitution of the United States in that it would deprive the defendant of its property without due process of law.

Wherefore defendant demands judgment dismissing the complaint with costs.

Snedeker and Snedeker, Attorneys for Defendant, Office & P. O. Address, 164 Montague Street, Brooklyn, New York.

(Verified February 10, 1943.)

[fol. 11] EXHIBIT "A", ANNEXED TO ANSWER

New York City, N. Y.
Nov. 13, 1942.

Whereas, the undersigned was employed by The Brooklyn Savings Bank, Clinton & Pierrepont Sts., Brooklyn, N. Y., herein called Employer, for all or part of the period of time between October 24th, 1938, when the Fair Labor Standards Act became effective, and April 20, 1942, under certain collective bargaining agreements between Realty Advisory Board on Labor Relations, Incorporated and Building Service Employee's International Union, Local 32-B, the last of which expired April 20, 1942, and while so employed did at times work more hours per week than the standard maximum hours provided by the Fair Labor Standards Act; and

Whereas, the undersigned has demanded overtime pay for all hours worked for the "Employer" in excess of the standard maximum hours prescribed by the Fair Labor Standards Act; and

Whereas, the actual amount of overtime pay due from the "Employer" for the period of time when the undersigned was employed by the "Employer" between October 24, 1938 and April 20, 1942, if any such overtime is due, is difficult of ascertainment; and

Whereas, there is uncertainty as to whether the undersigned has an enforceable claim; and

[fol. 12] Whereas, the parties desire to settle said claim without litigation, and thus to avoid the delays and uncertainties incident thereto;

Now therefore, the undersigned, in consideration of the payment to him of the sum of $427.43 by the "Employer" receipt of which is hereby acknowledged, accepts said payment as full settlement of all of his claims for overtime employment, and releases and discharges the "Employer", and all persons associated or acting with the "Employer" in connection with said matter, from any and all claims, debts, damages, or liabilities arising out of or in connection with his claims of any kind or character whatsoever growing out of his overtime employment as aforesaid, less Social Security $4.27.

William J. O'Neil, Employee.

Witness Frederick Davis.

In Municipal Court of City of New York

[Same Title]

Decision After Trial

Present William T. Keleher

I hereby find and decide that after trial defendant is entitled to judgment, complaint dismissed and I order and adjudge that said defendant have judgment accordingly.

William T. Keleher.

Dated: March 15, 1943.

[fol. 13] In Municipal Court of City of New York

Index No. 1625—1943

[Same Title]

Judgment

Judgment rendered in favor of the Brooklyn Savings Bank, defendant, located at Clinton & Pierrepont Streets, Borough of Brooklyn, City of New York.

Costs by Statute	$40.00
Prospective Marshal's Fee	1.00
Total	$41.00

State of New York,
County of Kings, ss:

Sedgwick Snedeker being duly sworn, deposes and says that he is an attorney at law associated with Snedeker & Snedeker the attorneys for the defendant in the above entitled action. That the disbursements above specified have been or will necessarily be made or incurred therein and are reasonable in amount; that a decision has been rendered after a trial in favor of the defendant dismissing the complaint, and ordering that defendant have judgment accordingly.

Sedgwick Snedeker.

Sworn to before me this 16th day of March, 1943.
Elizabeth Frewen, Notary Public, Kings County.

[fol. 14] Judgment entered the 16th day of March 1943.

The summons and complaint in this action having been personally served on The Brooklyn Savings Bank the defendant herein on the 5th day of February 1943 and the judgment rendered in favor of defendant against said plaintiff after a trial on the 15th day of March 1943.

Now on motion of Snedeker & Snedeker attorneys for the defendant it is,

Adjudged that the Brooklyn Savings Bank located at Clinton & Pierrepont Streets, Borough of Brooklyn, City

of New York defendant, have judgment dismissing the complaint herein; and the same hereby is dismissed, and do recover of William J. O'Neil plaintiff, the sum of $41.00 as costs and that the plaintiff have execution therefor.

Robert Duffy, Clerk.

[fol. 15] Sir:

Please take notice that the within is a true copy of a judgment made and entered in the within entitled action and duly filed in the office of the Clerk of the within named court on the 16th day of March, 1943.

Dated, March 16th, 1943.

Yours, etc., Snedeker & Snedeker, Attorneys for Defendant, Office and Post Office Address, 164 Montague Street, Borough of Brooklyn, New York City.

To Stein, Solomon & Simon, Esqs., Attorneys for Plaintiff, Office and Post Office Address, 225 West 34th Street, Borough of Manhattan, New York City.

[fol. 16] In Municipal Court of City of New York

Index Number 1625/1943

Tried at Central Jury Court, Non-Jury Part

[Same Title]

Case and Exceptions

Tried, March 15, 1943.

Before Hon. William T. Keleher, Justice.

Appearances:

Stein, Solomon & Simon, Esqs. (Max R. Simon, of Counsel), 225 West 34th Street, New York City, Attorneys for Plaintiff.

Snedeker & Snedeker Esqs., (S. Snedeker, of Counsel), 164 Montague Street, Brooklyn, New York, Attorneys for Defendant.

Samuel W. Jacobs, Official Stenographer.

Plaintiff's Counsel: I respectfully move to amend the summons in this action and the complaint by changing

the amount sought therein for reasonable attorney's fees to the sum of $400.

Defendant's Counsel: I respectfully object to that. Counsel here has shown no reason whatever for any in-
[fol. 17] crease in the value of the services. I leave that to your Honor's discretion.

Plaintiff's Counsel: Notice has been served upon them prior to the trial.

Defendant's Counsel: It was in the form of a letter.

The Court: The amount on the summons is 673.16. Are you increasing the amount?

Plaintiff's Counsel: The principal amount is 423 plus 250 attorney's fees. I want to increase that by another $200.

The Court: I will reserve decision on the motion to increase it.

Defendant's Counsel: Will your Honor entertain a motion to dismiss the complaint at this time?

The Court: Yes, surely.

Motion to Dismiss Complaint

Defendant's Counsel: The fourth paragraph of plaintiff's complaint alleges "upon information and belief that during the entire period of plaintiff's employment herein some or many of the tenants or occupants in said loft building were engaged in the production of goods for interstate commerce." I respectfully submit that the plaintiff's complaint in this action is insufficient in that it fails to state facts sufficient to constitute a cause of action. Under the case of Kirshbaum *v.* Walling, which, I take it, is the case upon which plaintiff relies in this action, that case was upon an agreed state of facts that all the tenants of the building were engaged in interstate commerce, and the furthest the case does go is that in order to establish a covered employee it must be shown that the tenants in the building where the employee was employed, that is, of the tenants a substantial number of tenants were principally engaged in interstate commerce. And I respectfully submit the allegation that some or many of
[fol 18] the tenants, or rather occupants, in said loft building were engaged in interstate commerce, engaged in the production of goods for interstate commerce is insufficient.

The Court: Do you wish to reply to that?

Plaintiff's Counsel: In view of the criticism levelled towards that allegation, I therefore respectfully move the Court to amend that paragraph four in the complaint to read as follows: Upon information and belief, that during the entire period of plaintiff's employment herein a substantial amount of the tenants or occupants in said loft building were engaged in interstate commerce and or were engaged in the production of goods for interstate commerce. I might mention in that respect, if your Honor please, that the proof in this case will show substantially that allegation. In other words, the allegation is being amended in order to conform to the proof which will be introduced.

Defendant's Counsel: As I have stated before, it is my belief that the case of Kirshbaum *v.* Walling establishes not only that a substantial number of tenants must be engaged in interstate commerce, but it must be shown that those tenants must be principally engaged, they must be principally engaged in interstate commerce, not that they may have had incidental transactions from time to time, but that must be their principal business, interstate commerce.

The Court: Do you object to the amendment?

Defendant's Counsel: I leave it to your Honor's discretion.

The Court: I would be inclined to grant it unless you object to it. I will reserve decision.

Defendant's Counsel: I can't see that there is any surprise here.

The Court: I will grant the amendment.

[fol. 19] William Joseph O'Neil, plaintiff, 203 East 77th Street, New York, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Plaintiff's Counsel:

Q. Mr. O'Neil, you are the plaintiff in this action, are you not?

A. Yes, sir.

Q. You are the man that is suing the bank?

A. Yes, sir.

Plaintiff's Counsel: If please the Court, I like to respectfully refer the Court's attention to paragraph four in the answer where defendants admit that they employed the plaintiff as a night watchman for the building 443 Fourth Avenue, Borough of Manhattan, City of New York, from November 5, 1938, to and including August 30, 1940.

Q. Your duties I take it, Mr. O'Neil, at this building, were that of night watchman?

A. That's right.

Q. How big a building is that, Mr. O'Neil?

A. It is an eleven-story building.

Q. How many elevators does it have?

A. Three elevators—two front cars and a freight car.

Plaintiff's Counsel: I call upon counsel for the defendant at this time to concede that from the 5th day of November, 1938, to the 3rd of May, 1940, this plaintiff was required to work 72 hours a week.

Defendant's Counsel: That is correct, yes.

Plaintiff's Counsel: I now further call upon counsel to [fol. 20] concede that this plaintiff——

Defendant's Counsel: Just a minute, there is no allegation in the complaint that they worked that many hours.

Plaintiff's Counsel: I will ask you to concede that by virtue of the examination before trial.

Defendant's Counsel: We will concede that, yes.

Plaintiff's Counsel: I call upon counsel for the defendant to further concede from the 4th day of May, 1940, to the 30th day of August, 1940, this plaintiff was required to work 59 hours a week.

Defendant's Counsel: That's correct.

Q. Mr. O'Neil, during this period I mentioned at first, that is, from November 5th to May 3, 1940——

Defendant's Counsel: Just a minute. Lest there be any mistake, so the concession is made that those were the regular hours under the agreed rate of pay. There is no concession he actually worked that number of hours. It is merely a concession those are the agreed regular working hours per week.

The Court: Very well.

Q. Mr. O'Neil, from November 5, 1938, to May 3, 1940, will you kindly tell his Honor how many hours a day you worked for how many days a week?

A. I worked—I started working at 8 o'clock at night and finished at 7 in the morning, six nights a week, without any lunch hour.

[fol. 21] Q. From May 4, 1940, to August 30, 1940, kindly tell the Court how many hours a night you worked for how many days a week.

A. I started Monday through Friday from 8 to 7 with one hour for lunch. Saturday night I worked from 9 at night to 7 in the morning, with one hour for lunch.

Plaintiff's Counsel: I believe counsel will concede that the first period I mentioned was 72 hours a week and the second period was 59 hours a week.

Defendant's Counsel: Those were regular work weeks?

Plaintiff's Counsel: Yes.

Q. And did you actually work each and every week of your employment at that building the hours you just mentioned?

A. I did.

Q. To the best of your recollection, Mr. O'Neil, did you lose any time for illness?

A. I did not lose any time.

Q. No time for illness?

A. No time, to the best of my recollection.

Q. In other words, to the best of your recollection, from November 5, 1938, to May 3, 1940, you actually worked 72 hours each and every week?

A. I did.

Q. And to the best of your recollection, from May 4, 1940, to August 30, 1940, you actually worked 59 hours a week?

A. I did.

Q. And that was 59 hours a week for each and every week of the period I have just set forth?

A. That's right.

Plaintiff's Counsel: I now call upon counsel for the defendant to concede that plaintiff's salary from Novem-

[fol. 22] ber 5, 1938 to April 21, 1939, was $23 a week.

Defendant's Counsel: It was $23 a week for a work week of 72 hours.

Plaintiff's Counsel: I will take that concession. To clarify the record I will ask counsel to concede that the salary of $23 a week was the salary paid to this plaintiff for a 72 hour week.

Defendant's Counsel: That was the agreed salary.

Plaintiff's Counsel: Yes. I further call upon counsel for the defendant to concede that from April 21, 1939, to the end or termination of plaintiff's employment here, his salary was $24 a week.

Defendant's Counsel: You will have to split it up in two periods.

Plaintiff's Counsel: Nevertheless, his salary was $24 a week.

Defendant's Counsel: I will concede that during the period from October 21, 1939, through May 3, 1940, the plaintiff's agreed salary was $24 for a regular work week of 72 hours and during the period, from the period May 4, 1940, to August 30, 1940, $24 for a regular work week of 59 hours.

Q. I again ask you, Mr. O'Neil, to the best of your recollection, you lost no time for sickness during that period?

A. I did not.

Q. In other words, you worked the amount of hours required of you each and every week of your employment?

A. Yes, sir.

Q. Actually worked?

A. Yes, sir.

[fol. 23] Q. Last year, some time, Mr. O'Neil, did you have occasion to see Mr. Davis?

A. Yes, I did.

Q. Mr. Davis is employed by the Brooklyn Savings Bank?

A. That is correct.

Q. Will you kindly tell the Court how you happened to see Mr. Davis?

A. I met friend of mine who told me Mr. Davis was looking for me, that he had a check for me.

Q. When about was that?

A. That was in the latter part of November or early in December.

Q. 1942?

A. 1942. And I went over to the Brooklyn Savings Bank, and I saw Mr. Davis and he gave me the check that was due me.

Q. He gave you a check for $423.16?

A. That's correct.

Q. Was any discussion had between you and Mr. Davis at the time he gave you the check?

A. Mr. Davis said, made a remark, something that he had a check, one half a thousand dollars and they couldn't locate me.

Q. Mr. O'Neil, at the time you got that check for 423.16, he asked you to sign a certain paper?

A. That is right.

Q. At the time you got the check and signed the paper, did Mr. Davis say anything to you about, "We do not know exactly how many hours you worked"?

A. No, he did not.

Q. Did he say to you, "Mr. O'Neil, we are not sure that you are covered under the Wages and Hours Act"?

A. No, he did not.

Q. Did he say anything about, that maybe you are not entitled to anything at all?

A. No, he didn't.

[fol. 24] Cross-examination.

By Defendant's Counsel:

Q. Mr. O'Neil, you read this paper there that you signed? You read it through before you signed it?

A. No, sir, I didn't.

Q. You just took this check for one-half a thousand dollars, and you signed it? Just took the paper and signed your name to it?

A. Yes, sir.

Q. You saw there was writing on it?

A. Yes, sir.

Q. But you never bothered to read it?

A. No, sir.

Q. Let me ask you, Mr. O'Neil, during the entire period of your employment, you signed work sheets, did you not?

A. Yes, sir; every week.

Q. Covering the—in which it was stated number of hours you worked, that you were hired to work each week, total salary and amount received by you?

A. Yes, sir.

Q. And each week you took your salary and receipted for it?

A. Yes, sir.

Q. Did you ever at any time, ever at any time protest that you were entitled to more money than you had received?

Plaintiff's Counsel: I object to that. After the Court has held, in a decision said that that question is objectionable, failure on the part of the employee to protest is not a defense.

The Court: Overruled.

Defendant's Counsel: I think it is alleged in the complaint that we refused to pay, that the defendant in this case refused to pay, and since no demand was ever made——

[fol. 25] Q. You never made any demand and the first time—you never made any demand upon the bank for payment until this suit was instituted, is that correct?

A. That's right.

Q. Mr. O'Neil, you stated that you knew the contents of these weekly work sheets?

A. Yes, sir.

Q. You said—one-half a thousand dollars—when you signed this paper. How does it happen that you were unware of the contents of that paper you signed?

A. I might have took it for granted that everything was all right.

Q. Was it your normal habit to sign any paper proffered to you?

A. If a check is attached to it.

Q. You are able to read the English language?

A. I am.

Defendant's Counsel: That is all, your Honor.

Redirect examination.

By Plaintiff's Counsel:

Q. In other words, I take it your position at the time you got that check was that you were mighty glad to get that check and you ran the moment you got it?

A. That's right.

ROBERT GENTLES, 1696 Second Avenue, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Gentles, what is your occupation?

A. Truck driver.

[fol. 26] Q. Were you employed by the Herman Furniture Company?

A. I was.

Plaintiff's Counsel: At this time, will counsel concede that Herman Furniture Company is one of the tenants of the building in question during the course of plaintiff's employment.

Defendant's Counsel: Yes, I concede that.

Q. How long were you employed by Herman Furniture Company?

A. Seven and one-half years.

Q. Were you so employed from November 5, 1938, to August 30, 1940?

A. Yes.

Q. You were so employed?

A. Yes.

Q. I take it, Mr. Gentles, that the Herman Furniture Company was engaged in the business of buying and selling furniture?

A. That's correct.

Q. How much space did they occupy in that building?

A. Three floors and a basement.

Q. Do you know, Mr. Gentles, where the furniture came from that they purchased?

A. Yes.

Q. Will you kindly tell the Court where?

A. Some come from Grand Rapids.

Q. That is Michigan?

A. Yes, sir. Some from Rockford, Illinois. And a lot of places furniture came from, about 80 per cent of the furniture come from out of town, out of state.

Q. In other words, 90 per cent of the furniture which came into their premises came from points outside of the State of New York?

A. That's correct.

Q. In your opinion, Mr. Gentles, what portion of the furniture that was sold and delivered by Herman Furniture [fol. 27] Company, was sold and delivered to customers outside of the State of New York?

Defendant's Counsel: Your Honor, I object to this. I do not think this witness is a competent witness for this purpose. I am quite sure that his knowledge in this matter is merely expressing an opinion as to the business. I do not think anybody is competent to testify in behalf of these tenants, other than the business manager or a person in the actual conduct of the business. He is a shipping clerk or truck driver.

The Court: How would he know about that?

Plaintiff's Counsel: He was the truckman.

The Court: I will take it subject to a motion to strike out. Show what he does know.

Q. How much would you say, what portion of the merchandise that was sold and delivered by the Herman Furniture Company was sold and delivered to customers outside of the State of New York?

A. I would say one-half of the furniture delivered out of 443 Fourth Avenue went to New Jersey or Connecticut.

Q. They did a wholesale business?

A. That is correct.

Q. Were you the man that delivered the furnifure?

A. I was.

Q. You also worked on the floor?

A. I did.

Q. Is there any question in your mind, Mr. Gentles, that a substantial portion of the furniture which was sold and [fol. 28] delivered by the Herman Furniture Company was sold and delivered to customers outside of the State of New York?

A. That is correct.

Q. And these shipments of merchandise from states outside of New York into New York, and shipment again from New York outside of New York, were they regular and continuous shipments?

A. Continuous, yes, during the time we were in that building.

Q. Were they purely casual and incidental?

A. I don't know what you mean.

Q. Once in a while did that happen, or regularly?

A. It happened every week.

Q. Every day of the week?

A. Every day of the week, yes.

Q. The furniture that came in, was that all finished furniture?

A. Not all finished furniture.

Q. Did a lot of the furniture which came in require further work on it?

A. Yes, it had to be finished.

Q. Tell the Court what had to be done.

A. It come in the raw wood and had to be colored, made into walnut or mahogany, whatever the case may be.

Defendant's Counsel: I object to this witness testifying. It is entirely hearsay. He has no knowledge which person stains——

The Court: Overruled.

Q. Did you see that furniture being finished?

A. I did.

Q. Every day in the week?

A. Every day in the week, yes.

Q. And a good proportion of the furniture which came in had to be finished?

A. Yes, sir.

[fol. 29] Q. Had to be sprayed?

A. Correct.

Q. And they had men working for them who finished this furniture?

A. Correct.

Q. Each and every day of the week?

A. Right.

Q. And that is the same furniture that kept going out of the state?

A. Correct.

Q. Were any of the deliveries that were delivered to the Herman Furniture Company—question withdrawn. Did Herman Furniture Company have to assemble any furniture on their premises?

A. Yes, tables and such like that, dining room and dinette tables had to be assembled after they came in.

Q. In other words, parts of it came in?

A. Yes, sir.

Q. And they had employees assemble those parts into the finished product?

A. That is correct.

Q. And that was a continuous part of their business?

A. That is correct.

Q. It was not purely incidental?

A. No.

Q. And that was a substantial part of their business, assembling these tables?

A. Yes, they had sold a lot of dining room furniture. These things had to be assembled before they went out.

Defendant's Counsel: I respectfully submit this witness may be competent to testify as to seeing work done on the furniture in the building, but he is not competent to testify what percentage of the tenants' of these particular tenants' business, was interstate commerce business. He has no knowledge of the entire scope of the business, and certainly no knowledge of the percentage of the business that were [fol. 30] interstate commerce. I submit as to those questions, his answers are objectionable. I move to strike out those answers.

The Court: Decision reserved on the motion.

Q. Would you say from your personal knowledge, that was one of the principal parts of Herman Furniture Company's business?

A. Yes, sir.

Q. Getting in merchandise from points outside of the State of New York?

Defendant's Counsel: I object to this. I think it is new matter.

A. Yes.

Q. Did you see very much furniture coming in from points in the State of New York?

A. Yes, I did.

Q. In other words, merchandise was coming from both places?

A. That is right.

Q. Where did it come from mostly?

A. From Yorktown, Pennsylvania, from the Yorktown Furniture Company.

Cross-examination.

By Defendant's Counsel:

Q. You drove a truck, did you, for this company?

A. I did.

Q. Did you, in your duties with that company, ever have to take that truck outside of the State of New York?

A. Yes, I did.

Q. Did you ever actually take any goods from outside of the State of New York into the, your office there at the building or into the premises of the building?

A. Yes, we did.

Q. There were facilities at the Herman Furniture Com- [fol. 31] pany in this building for storage?

A. The basement was the part where we stored our furniture.

Q. You stored the furniture there?

A. That's right.

Q. Some of it was brought in from outside of the state?

A. Yes, sir.

Q. And then it would be stored in the building, and when you received orders for it you delivered it in the city?

A. Not in the city. Three days a week we went to Jersey; two days a week to different parts.

Q. But most of your business consisted of deliveries in New York State?

A. I wouldn't say most of it. Three days a week we went to Jersey.

Q. I asked you not the number of days a week you were engaged in delivering. I am asking you—that a substantial, perhaps most of the furniture delivered by you was delivered in the City of New York?

A. No, I wouldn't say most of it, fifty-fifty proposition; I would say half would go out and half in the city.

Redirect examination.

By Plaintiff's Counsel:

Q. You have been here pursuant to a subpoena, were you not?

A. That is right.

Q. Your testimony with reference to the assembly of the furniture and finishing of the furniture is based upon your personal knowledge?

A. That is correct.
Q. You actually saw these operations?
A. That's correct.

Defendant's Counsel: I respectfully renew the motion.
The Court: Decision reserved on the motion to strike out.

[fol. 32] Mollie J. Walder, 76-36 113th Street, Forest Hills, Long Island, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Walder, you are here pursuant to a subpoena, are you not?
A. Right.
Q. In the years 1939, 1940, were you employed by Robert Steinberg?
A. Right, Steinberg Bros.

Plaintiff's Counsel: Counsel, I believe that Robert Steinberg was a tenant in the premises during the years mentioned.
Defendant's Counsel: Yes, I concede that.

Q. They occupied an entire floor during these years, Mrs. Walder?
A. Yes.
Q. What business were they in during those years?
A. Manufacturing, exporting gloves, or importing rather.
Q. You also manufactured gloves, did you not, right on the premises?
A. Yes.
Q. During those years, Mrs. Walder, merchandise kept constantly coming in from points outside of the State of New York into your premises?
A. Yes.

Defendant's Counsel: I object to that.
The Court: Overruled.

Q. What is your position with them, by the way?
A. Office manager.

Q. And you are personally acquainted with those facts, are you not?

A. More or less.

Q. The principal business of Steinberg Bros., however, [fol. 33] during that time, was manufacturing gloves, was it not?

Defendant's Counsel: I object to this, your Honor.

The Court: Overruled.

A. Yes.

Q. And after you got those gloves you sold them to customers outside of the State of New York?

A. Inside and outside of the State of New York.

Q. Your sales to customers outside of the State of New York were a regular part of your business?

A. Yes.

Q. Continuous?

A. Yes.

Q. It was not once a month?

A. No.

Q. In other words, it was regular and continuous?

A. That's right.

Q. And you ship and pack gloves?

A. Yes.

Q. You handle them personally?

A. Not I.

Q. Men employed in the firm?

A. Yes, sir.

Q. Wrapped them in boxes and then sent them out, delivered to points outside of the State of New York, amongst other things?

A. Yes.

Cross-examination.

By Defendant's Counsel:

Q. I think you said you were hired in the capacity——

A. Office manager.

Q. What do you mean by office manager? You mean that you answer inquiries in relation to people coming in to see one of the officers of the business?

A. Not necessarily. No, the managership of an office pertains to all details and routine that comes into the office,

checking credits, checking sales, correspondence, just takes care of a multitude of things.

Defendant's Counsel: That's all.

[fol. 34] SAMUEL BRECKER, 225 West 86th Street, New York City, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Brecker, you are here pursuant to a subpoena, are you not?

A. Yes, sir.

Q. Who are you connected with?

A. Decorator Fabrics.

Plaintiff's Counsel: I believe counsel will concede that Decorator Fabrics, Inc., was a tenant in the premises in question during the period of plaintiff's employment.

Defendant's Counsel: That's correct.

Q. What is your relationship towards this firm, Mr. Brecker?

Defendant's Counsel: I will concede that this tenant was in possession for a portion of the plaintiff's employment in the premises.

Plaintiff's Counsel: What portion?

Defendant's Counsel: You can establish that from your witness.

Plaintiff's Counsel: I am going to ask you to show me your records.

Defendant's Counsel: I will say he was in there from February 1, 1940. You can get it from the witness.

Q. Do you know of your own knowledge, Mr. Brecker, when you moved into that building?

A. January, 1938, I believe.

[fol. 35] Plaintiff's Counsel: I will therefore not take that concession.

Defendant's Counsel: Just a minute. I believe you are referring to—the tenant now under discussion is Decorator Fabrics, is that correct?

Plaintiff's Counsel: Yes.

Defendant's Counsel: Go ahead.

Q. You are in there from 1938?

A. 1938, that's right.

Q. What is the business of Decorator Fabrics, Inc?

A. Wholesale upholstery, drapery materials.

Q. Did you buy merchandise during the years 1930 or 1940 from points outside of the State of New York?

A. Yes.

Q. And were these purchases regular parts of your business?

A. That's right.

Q. Thereafter, when the merchandise came in, Mr. Brecker, did you do anything to those goods on your premises?

A. Yes, we would cut them up and distribute them according to the specifications of the orders we would get.

Q. And after you would cut them up you would then ship them, amongst other things, to customers outside of the State of New York?

A. Yes.

Q. Was that a regular and substantial portion of your business?

A. That's right.

Q. And I take it—it is rather academic—you handled the goods physically while they were in your premises?

A. That is true.

Q. You have these goods dyed to your specifications?

A. On occasions, most of it came in already dyed.

Q. Did you purchase the green goods or the finished product?

[fol. 36] A. Essentially, our purchases consisted of the finished product.

Q. Did you have any machines in your premises?

A. No.

Q. Cutting machines?

A. No.

Q. They were cut by hand?

A. That's right.

Q. And I take it, therefore, that purchasing merchandise from points outside of the State of New York and then delivering them to customers outside of the State of New York was a regular and continuous part of your business?

A. That's true.

Q. And it was a substantial portion of your business?

A. That's true.

Q. As a matter of fact, the principal purchases you made during the time of plaintiff's employment herein was from customers outside of the State of New York?

A. We sell to customers. The principal purchases were not made from customers. They were made from our sources.

Q. You got goods from sources outside of the State of New York?

A. No, I wouldn't say our principal sources, I would say about one-half.

Q. And it was regular and continuous?

A. That's right.

Q. How much space do you occupy in that building, Mr. Brecker?

A. In those years, we occupied, I think, about one thousand feet.

Q. About one-half of a floor?

A. No, about one-quarter of a floor.

Cross-examination.

By Defendant's Counsel:

Q. Mr. Brecker, are you associated with Brecker Fabrics, Inc.?

A. Yes, sir.

Q. In what capacity?

A. I am the treasurer of the company.

[fol. 37] Q. Isn't it true that Decorator Fabrics, Inc., actually were not under a lease in those premises in February, 1940?

A. I signed checks for Decorator Fabrics; for Decorator Fabrics, and we got in there January, 1938.

Q. Decorator Fabrics, Inc., the tenant now being discussed, they were in possession and did not go into possession under a lease until February 1, 1940?

A. You are wrong. We went into possession under that lease in 1938. We went to a different floor in 1940, moved into larger space.

Q. Didn't you conduct a business with your name, under the name of Samuel Brecker, from January 1, 1938, until February 1, 1940?

A. No, sir; I have always been with Decorator Fabrics.

Q. You were not on the lease with the bank?

A. Sure, I was on the lease, as well as the other members of the corporation.

Q. Mr. Brecker, these goods, that portion of the goods of your business which you state were imported from outside the state, you had storage rooms in the building there, did you not, where you kept these goods when they came in?

A. We kept them on our own premises.

Q. Thereafter, as you received orders, you shipped them out?

A. Yes, sir.

Q. They regu-arly came in and remained on your premises for some period of time and were shipped out on being ordered by your customers, is that correct?

A. That is correct.

Redirect examination.

By Plaintiff's Counsel:

Q. Would I be safe in stating that the purchases you made of merchandise from sources outside of the State of [fol. 38] New York and the shipments from the State of New York to customers outside of the State of New York, run into thousands upon thousands of dollars each year?

A. Yes.

HYMAN GILBERT, 3921 45th Street, Sunnyside, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Gilbert, I believe you are here pursuant to a subpeona served upon you?

A. Right.

Plaintiff's Counsel: I believe counsel will concede that Mr. Gilbert was a tenant in these premises during the time in question?

Defendant's Counsel: I will concede that Mr. Gilbert was a tenant in possession during a portion of the plaintiff's employment, yes, sir.

Q. Mr. Gilbert, when did you move into that building?

A. I can't remember exactly. I think it was about end of 1938.

Q. November, December?

A. December.

Plaintiff's Counsel: Is that correct?

Defendant's Counsel: No, it is not. I will concede that he was a tenant in possession from March 15, 1940, to the end of plaintiff's employment.

The Witness: I think it was earlier than that. It may [fol. 39] have been after December of 1938. I have been there about four years.

Q. Mr. Gilbert, what is your business?

A. General exporter and representative of several overseas accounts.

Q. From November 5, 1938, up to August 30, 1940, I take it, that your business was buying merchandise that came from points outside of the State of New York, principally, and selling it to customers and delivering it to points outside of the State of New York, is that a correct statement of fact?

A. I would hardly say principally, but generally merchandise might come from anywhere outside of the State of New York.

Q. Was that a substantial part of your business?

A. A fair proportion.

Q. And a regular and continuous part of your business?

A. Yes.

Q. And these transactions ran into thousands of dollars a month?

A. Yes, definitely.

Q. And when the merchandise came in from points outside of the State of New York, you handled the goods physically?

A. A good part of them.

Q. Not you, personally, but your employees.

A. Yes.
Q. You have a stockroom there?
A. Yes, sir.
Q. This merchandise in stock?
A. Yes, sir.
Q. And when you sold it you had to wrap it up?
A. Usually the way other goods, to go overseas.
Q. You assembled goods on the premises?
A. From the point of view of consolidating and packing them.
[fol. 40] Q. And that was a regular and continuous and substantial part of your business?
A. Yes, sir.

Cross-examination.

By Defendant's Counsel:

Q. You said you would bring them together and pack them up and ship them out?
You have testified that you were in possession in the premises from some time in 1938?
A. I said I thought it was some time in 1938. It may have been early in 1938; certainly, I have been there about four years.
Q. Do you know how many leases you signed?
A. Yes, sir; I have signed two leases.
Q. What were the rooms occupied by you in the building?
A. 806 and 807.
Q. You still occupy those rooms today?
A. Yes.
Q. Mr. Gilbert, is that your signature on this lease?
A. It is my siganture.
Q. I hand you this lease. Isn't that a lease covering rooms 807 and 808?
A. It is possible; that is correct, yes.
Q. You testified you occupied rooms 806 and 807.
A. That's right. The entrance is 807. My entrance is 807. 808 is entrance, it is a means of entrance I never used or very, very seldom used. Since it is a stockroom and leads right into the hall, I keep it locked. The only time I open it, when goods are going on to the trucks. It is possible to be in error as to the number of the room.

Defendant's Counsel: Counsel, I show you the lease which Mr. Brecker, who just left the stand—he was in pos-

session—this is the lease on exactly the premises as the [fol. 41] present witness claims he occupied. You won't concede that?

Plaintiff's Counsel: I am not.

The Witness: Certainly this man in possession of the premises should know whether he was in possession or not.

HERBERT EARLY, 1700 Albemarle Road, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Early, you are here pursuant to a subpoena I served upon you?

A. Yes, sir.

Q. Whom are you employed by?

A. Dodd, Mead & Company.

Q. They are the book publishers?

A. Yes.

Q. Were you with Dodd, Mead & Company from November 5, 1938, to August 30, 1940?

A. Yes.

Q. And at that time, they occupied an entire floor at 443 Fourth Avenue?

A. Yes, sir.

Q. What is your position in that firm?

A. I am assistant to the president.

Q. Mr. Early, during those years was there a constant flow and regular flow of publications of various sorts, such as catalogs, letters, pamphlets, from your premises to points outside of the State of New York?

Defendant's Counsel: I object to that, your honor. I think there is an attempt to lead the witness.

[fol. 42] The Court: I will allow it. Try not to lead the witness. Overruled.

A. Yes.

Q. Roughly, how many letters would you say went out from your office to points outside of the State of New York a day? The question might be academic.

A. A thousand, fifteen hundred.
Q. How many catalogs went out a day?
A. That is difficult to say.
Q. Thousands during the year?
A. Yes.
Q. Many thousands?
A. Yes.
Q. Advertising matter of various sorts?
A. Yes, sir.
Q. Literature of various sorts?
A. Yes.
Q. Do you people publish the books yourselves?
A. Yes, we are publishers.
Q. And is there a constant flow of literature of various sorts coming from outside of the State of New York to your offices at Fourth Avenue, in the usual course of mail, literature, orders from customers, I hope?
A. Yes.
Q. And telegrams?
A. Yes.
Q. You occupied an entire floor, did you, Mr. Early?
A. Yes.

Cross-examination:

By Defendant's Counsel:

Q. Did you actually print any books at the premises there?
A. No.
Q. You just stored books that were manufactured?
A. No, that was a purely a business and editorial office. We had no stockroom there.

[fol. 43] Redirect examination.

By Plaintiff's Counsel:

Q. You composed editorials in that office?
A. Advertising.
Q. You composed advertising matter?
A. Yes.
Q. You had advertising men working there?
A. Yes.
Q. They composed ideas on paper?
A. Yes.

Q. And they later, and those ideas, the finished product later went into, inside journals?

A. Yes, sir.

Q. Went to customers outside of the State of New York?

A. Yes, sir.

Q. And that was a regular and continuous portion of your business?

A. Yes.

Q. At Fourth Avenue?

A. Yes, all our business was done at Fourth Avenue.

Q. Did you have artists working for you up there?

A. Yes, sir.

Q. Creating ideas?

A. Yes.

Q. Pictures?

A. Yes.

Q. And those things were later shipped to customers and sources outside the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes.

Defendant's Counsel: That is all, your Honor.

Edward M. Reece, 24 Prince Avenue, Baldwin, Long Island, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Reece, you are here pursuant to a subpoena that was served upon you?

A. Yes.

[fol. 44] Q. Who are you connected with, Mr. Reece?

A. Calree Glove Company.

Plaintiff's Counsel: I believe counsel will concede that Calree Glove Company was a tenant in the premises in question during the term of plaintiff's employment herein?

Defendant's Counsel: We will concede that the Calree Glove Company was a tenant in possession from February

1, 1940, to the end of the plaintiff's employment. I beg your pardon, they occupied different space. We will concede they occupied as tenants in possession from February 1st—yes, during the entire period of plaintiff's employment.

Q. Mr. Reece, what was the business of Calree Glove Company during that time?

A. Jobbing in gloves.

Q. You had gloves manufactured for you?

A. That is right.

Q. Where was this manufacturing done during this time?

A. New York City.

Q. And the gloves would come into your premises?

A. Yes, sir.

Q. Did you have to handle the gloves physically?

A. Right.

Q. Did you have to crate them, pack them?

A. Pack them, right.

Q. During the time in question did you ship gloves to customers outside of the State of New York?

A. I did.

Q. Regularly and continuously?

A. That is right.

Q. And was that a substantial portion of your business?

[fol. 45] A. Not—it was a regular portion of the business.

Q. Many thousands of dollars' worth of business of manufacturing?

A. That is right.

Q. To customers outside of the State of New York?

A. That is right.

Q. You had to pack the goods to customers outside of the State of New York?

A. That is right.

Cross examination.

By Defendant's Counsel:

Q. You never did any actual manufacturing of these goods at the premises, did you?

A. Never.

FRANCES EMILY DONOHUE, 3820 27th Street, Long Island City, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Donohue, you are down here pursuant to a subpoena?

A. Yes.

Q. What firm are you connected with?

A. John E. Fuchs Company.

Q. How long has John E. Fuchs been at 443 Fourth Avenue?

A. I believe they took those rooms in 1937. I am not sure that that is the year.

Q. And you have been with them ever since?

A. Since 1935.

Q. In what capacity?

A. Glove packer.

Q. John E. Fuchs is a glove manufacturer?

A. That is right.

[fol. 46] Q. They manufacture right on the premises?

A. Yes.

Q. They get the raw materials from points outside of the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes.

Q. And then they manufacture those raw materials right on the premises?

A. That's right.

Defendant's Counsel: I make the same objection as to the witness testifying to the percentage of the business that is interstate. She said she is a glove packer. I do not think she is competent to know.

The Court: Overruled. The Court will pass upon that, Counsel.

Q. You have charge of the shipping, do you not, Miss Donohue?

A. Yes.

Q. From November 5, 1938, up to and including the 30th day of August, 1940, did John E. Fuchs ship the

finished gloves or the gloves that were manufactured on the premises to customers outside of the State of New York?

A. That's right.

Q. Did John E. Fuchs ship these gloves regularly and continuously?

A. Every day.

Q. And these shipments were a regular part of the business?

A. That's right.

Q. Conducted on the premises?

A. That is right.

Q. And the principal functions of John E. Fuchs were manufacturing gloves?

A. Yes.

Cross examination.

By Defendant's Counsel:

Q. You just testified they manufactured gloves. What [fol. 47] did they do in the way of manufacturing gloves?

A. They sewed them by hand and cut them, sewed by the machine.

Q. They created the specimens?

A. Yes, they design there.

Q. They design the gloves there?

A. That is right, and they are cut and sewn there.

Q. How many people would you say were cutting and designing gloves there?

A. Just one.

Q. How many pairs of gloves would she design a month, would you say?

A. Maybe about fifteen or twenty styles, possibly more.

Q. The only manfacturing that was done by this one person, created these designs and submitted them to local merchants in New York?

A. New York and out of state.

Redirect examination.

By Plaintiff's Counsel:

Q. Mr. Snedeker said about twenty designs a month. Did you mean only twenty pairs of gloves were manufactured a month?

A. No.

Q. Thousands upon thousands of pairs were manufactured and shipped to customers?

A. Yes, sir.

Q. Outside of the State of New York?

A. That is right.

Q. You occupy about one-half a floor up there, do you not?

A. Little less.

[fol. 48] FANNIE DAYCH, 825 New York Avenue, Brooklyn, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Miss Daych, you are here pursuant to a subpoena served upon you?

A. Yes.

Q. By whom are you employed, Miss Daych?

A. Wallerstein Textiles.

Q. Were you so employed, Miss Daych, on the 5th day of November, 1938?

A. No, have been with them since June, 1939.

Q. Ever since?

A. Yes.

Plaintiff's Counsel: I believe counsel will concede that Wallerstein Textiles were tenants in those premises during the time in question.

Defendant's Counsel: Yes.

Q. What is the business of Wallerstein Textiles?

A. Converters of fabrics, lastex fabrics.

Q. And they have been in that business ever since you have been with them?

A. Yes.

Q. Is it not a fact, Miss Daych, that Wallerstein purchases green goods from the mills?

A. That is right.

Defendant's Counsel: Your Honor, I object to this line. The witness has not been asked her capacity with the company as yet.

The Court: Sustained.

Q. What is your——

A. I am a bookkeeper.

Q. Are you personally acquainted with the purchases made by Wallerstein Textiles?

A. I am.

[fol. 49] Q. And they purchase green goods from mills?

A. They do.

Q. Outside of the State of New York?

Defendant's Counsel: I object to that. I do not think, as a bookkeeper, she is competent to answer that.

By the Court:

Q. According to the books, do the books show that?

A. Yes.

By Plaintiff's Counsel:

Q. Is that correct, Miss Daych?

A. Yes, sir.

Q. Mills outside of the State of New York?

A. Yes, sir.

Q. And then you ship merchandise to dyers?

A. That is rght.

Defendant's Counsel: I object to that. Counsel is leading.

The Court: Sustained.

Q. What happens to the goods after you purchase them from the mills?

A. We have them finished by various bleacheries.

Q. A lot of them are outside of the State of New York?

A. Most of them are outside of the State of New York.

Q. After the goods are bleached outside of the State of New York, what happens to them?

A. Some of them are shipped directly from the bleachery to the customer and some of them are shipped to our office in New York City.

Q. You also have a loft?

[fol. 50] A. We have shipping space and they are shipped to various customers from our end.

Q. Shipped to customers outside of the State of New York?

A. Yes.

Q. Regularly and continuously?

A. Yes, sir.

Q. And a substantial portion of the shipments are made to customers outside of the State of New York?

A. They are, yes, sir.

Q. You handle the goods physically there?

A. Yes.

Q. You cut them sometimes?

A. Very seldom, for sample pieces.

Q. And the shipments made from the bleacheries are made to customers outside of the State of New York?

A. Yes, sir.

Q. Regularly and continuously?

A. Yes, sir.

Q. And the amount of shipments you have made during that time to customers outside of the State of New York run into thousands and thousands of dollars each month?

A. There were.

Q. From your office at New York and from the bleacheries.

A. Yes.

Defendant's Counsel: No questions.

FREDERICK DAVIS, 190 Linden Street, Rockville Center, Long Island, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. Mr. Davis, you are connected with the Brooklyn Savings Bank, are you not?

A. I am.

Q. And had been back in November of 1938?

A. I was.

[fol. 51] Q. In what capacity, sir?

A. Real estate supervisor.

Q. And you are acquainted with the building at 443 Fourth Avenue?

A. I am.

Q. Do you have the records of employment of this plaintiff with you in your possession?

A. Yes, sir.

Q. Will you please look at those records? By the way, Mr. Davis, you are the man I examined before trial last week some time?

A. That is right.

Q. In behalf of the bank?

A. That's right.

Q. Mr. Davis, you remember the time you gave Mr. O'Neil his check for $423, do you not?

A. Yes, I do.

Q. You are acquainted with the Kirshbaum decision by the Supreme Court?

A. I know there has been a decision by the Supreme Court.

Q. And the Walling decision by the Supreme Court?

By the Court:

Q. You are not an attorney?

A. Not an attorney.

The Court: What is the use of asking him?

By Plaintiff's Counsel:

Q. Did you figure out the amount, Mr. Davis, that would be due this man in the event he were covered by the act?

A. No.

Q. Did anybody in the bank?

A. Some of them were figured.

[fol. 52] Q. Was Mr. O'Neil's?

A. I am not sure of that.

Q. Will you look at your records and see?

A. Records of payroll sheets.

Q. You wouldn't have any records?

A. I have no records indicating what Mr. O'Neil, the figures arrived at.

Q. Do you know how to figure these things out?

A. After a fashion.

Defendant's Counsel: I advised counsel to make any evidence available at the trial if he wished. He said, "Will you bring certain papers?" I said, "Any papers you will subpoena we will be glad to bring." He did not subpoena

Mr. Davis or the papers. He wishes to examine Mr. Davis, who has not refreshed his recollection from the papers.

The Court: What is the concession you want?

Plaintiff's Counsel: Assuming that the Court determines that this man, as a result of his employment at 443 Fourth Avenue, for the time at issue, assuming that his employment was such as to be covered by the Fair Labor Standards Act of 1938, would you agree, Mr. Snedeker, that the amount of such overtime earned by this plaintiff was the sum of $423.16?

Defendant's Counsel: No, I would have to see that. That is the most substantial fact at issue in the case.

The Court: The Court will determine that, Counsel.

[fol. 53] MOTION TO DISMISS DEFENSES CONTAINED IN ANSWER

Plaintiff's Counsel: That's all. Plaintiff rests. At this time, I move to dismiss those defenses in the answer of this action marked "First separate and complete defense" and "Second and Partial Defense," on the ground that they are legally insufficient.

The Court: Decision reserved on the motion.

MOTION TO DISMISS COMPLAINT

Defendant's Counsel: I'd like to make a motion at this time at the completion of the plaintiff's case, that the plaintiff has failed to sustain the burden of proof here. And I respectfully move that the complaint be dismissed, as to sufficiency. All of the tenants who have testified—they were never asked during what period they were tenants in possession. I was asked to concede that they were tenants for portions of the period, but I think if your Honor reviews the evidence you will find that a substantial number of these witnesses never testified during what period of plaintiff's employment they were in possession. Obviously, the character of the tenancies from time to time during the employment would affect whether the employee or the building was engaged in interstate commerce. As to some of the tenants, there was no testimony as to the space that they occupied during the period.

The Court: Decision reserved on the motion.

[fol. 54] FREDERICK DAVIS, now called as a witness in behalf of the defendant, having been previously sworn, testified as follows:

Direct examination by Defendant's Counsel:

Q. Mr. Davis, on November 13, 1942, did Mr. William O'Neil, the plaintiff in this action, call at the bank?

A. He did.

Q. Did you have a conversation with Mr. O'Neil?

A. I did.

Q. Did you explain to him the purpose——

Plaintiff's Counsel: He is leading the witness.

The Court: You did, a great deal.

Defendant's Counsel: Question withdrawn.

Q. Did you explain to Mr. O'Neil that he might have a possible claim under the Act in this case? Let me ask you this: What did you say to Mr. O'Neil when he called at the office that morning?

A. When Mr. O'Neil came in, he came in, said he heard a number of people were obtaining moneys on the Wage and Hour Law, and he came in to see if he was entitled to any himself. I answered we figured we could give him some money. We could figure it out to give him some money; to stop any possible chance later on of a claim, we would figure out and give him a flat amount of compensation and overtime.

Q. And did you explain to Mr. O'Neil that in paying the sum to him at that time he agreed to release the bank from any possible liability for unpaid overtime compensation in the event he would consider——

[fol. 55] Plaintiff's Counsel: He is putting conversation in his mouth.

A. I stated, in order to obtain any moneys it would be necessary for him to sign certain papers and in this case, as in all cases, I explained the nature of the paper that would have to be signed.

Q. And did Mr. William O'Neil sign a certain release in your presence at that time?

A. He did.

Plaintiff's Counsel: I will concede that is the release he signed.

Defendant's Counsel: I offer in evidence this release. This is the release which we plead by way of a complete defense to the action.

(Release received and marked Defendant's Exhibit "A" in evidence.)

Defendant's Counsel: Does the plaintiff concede that that is Mr. O'Neil's signature?

Plaintiff's Counsel: Yes.

Defendant's Counsel: Does counsel concede that the contents of this is the same as the defense? I do not think it is necessary to do that.

Plaintiff's Counsel: It is in the answer.

Q. (Showing witness paper.) Is that the instrument which was signed at that time by Mr. O'Neil?

A. It was.

Q. Did he also sign at that time an affidavit on the back as to his citizenship?

A. He did.

[fol. 56] Q. Is that the affidavit signed by Mr. O'Neil?

A. That is the one.

Q. Is that your signature on the release?

A. My signature on the release as a witness.

Q. Now, Mr. Davis, is it a fact that it was the purpose of the bank to keep this building——

Plaintiff's Counsel: I object to that.

Q. Mr. Davis, what was the policy of the bank as far as the type of building they tried to keep? Did the bank make any effort to keep this building—to keep out of this building tenants who were engaged in manufacturing?

Plaintiff's Counsel: I object to that.

The Court: Overruled.

A. We made an attempt. In fact, we put one tenant out who was doing manufacturing. We classified it as showroom and office building entirely. We even submitted leases to the tenants as office building leases.

Q. Mr. Davis, did a large percentage of the leases in this building contain a clause which permitted the landlord to terminate the lease if the tenant engaged in manufacturing?

Plaintiff's Counsel: I object to that, if the Court please. That has no relevancy to the issues at bar.

The Court: That will be taken into consideration. Objection overruled.

A. The usual clause is if a tenant defaults in any of the covenants or conditions of the lease, he may receive notice at the option of the landlord, and his lease terminated and the tenant vacate.

[fol. 57] Q. Mr. Davis, you examined all the leases, did you, in connection with this building during this period of time?

A. I practically examined every one and put my signature on them as subscribing witness for the bank.

Q. When I say recently—in the last day or so you have checked over the leases?

A. I have checked over the leases in the last day or so.

Q. Did you read them with particular attention to the clause in the leases, that is, type of business that was to be conducted by the tenant in the premises?

Plaintiff's Counsel: I object to that.

The Court: Overruled.

A. I did check the leases and find that it is the real estate board form of lease. Therefore, I knew the clause was in it. I checked in most cases and found out the type of business the firm was to do, it had agreed to do in making the lease.

Q. In making this inspection of all leases covering this period, did you find any of them where the specific permission to manufacture on the premises was given?

A. Where specific——

Q. Generally, what were the purposes, what was the type of business which was permitted under these leases?

Plaintiff's Counsel: I object. This man is not a lawyer. He asks him to interpret leases.

A. The majority leases read "executive offices, salesrooms, showrooms," in connection with tenant's business, that was the general makeup of the term, of the tenant's business.

[fol. 58] Defendant's Counsel: Your Honor, I do not want to go through the trouble of having Mr. Davis testify

to all these, but since I have made concessions innumerable to my opponent—however, if he forces me to do so—my purpose of offering the leases here is to show, and I think they will show, that none of the tenants were given the privilege of carrying on any businesses, of doing any manufacturing whatsoever on the premises, and the leases contained specific provisions entitling the landlord to terminate the lease if there is any manufacturing conducted on the premises.

By the Court:

Q. That is correct, is it?

A. That is correct.

Defendant's Counsel: I offer these in evidence.

The Court: You may, if you wish, but we have his testimony.

By Defendant's Counsel:

Q. Mr. Davis, is it a fact, that after the, that at the present time this building, August 30, 1940, roughly three years ago—it is true that at the present time, that the nature of the business in the building has changed?

Plaintiff's Counsel: I do not see that has any bearing.

The Court: Since when?

Defendant's Counsel: The plaintiff's hiring ceased in August, 1940. What I am seeking to prove here is that [fol. 59] these witnesses who have been called to court to testify as to the nature of the business are obviously testifying as to the present condition of the business.

Q. Mr. Davis, isn't it a fact that whereas at the present time, isn't it a fact that—I think I will let it go, your Honor.

By the Court:

Q. Has the character of the business changed in recent years? If so, about when?

A. We had a number of vacancies in the building from time to time because we are trying to run or operate a non-manufacturing building. In 1942, we decided we could do better if we changed it over to manufacturing, which we did.

Defendant's Counsel: Your Honor, my opponent has subpoenaed a small percentage of the tenants in this building.

Plaintiff's Counsel: That is a question of opinion.

By Defendant's Counsel:

Q. Mr. Davis, will you tell me how many tenants there were in this building during the period of the plaintiff's employment?

A. About twenty tenants in the building.

By Plaintiff's Counsel:

Q. How many?

A. Approximately twenty tenants in the building.

[fol. 60] By Defendant's Counsel:

Q. There were more than that?

Plaintiff's Counsel: Just one moment now.

Q. Have you a list of the tenants that we gave to Mr. Simon at the examination before trial?

Defendant's Counsel: By the way, Mr. Simon, can I have a copy of the examination which you never served on me?

Plaintiff's Counsel: Yes.

Q. Have you got a typewritten list of the tenants in the building we gave to——

Defendant's Counsel: Will you concede there are 27 tenants in the building there?

A. Some of those tenants were in and out and space was taken by other people. You asked the question, approximately how many tenants were in the building at any one time. I will say about 20 tenants were in the building during a given period. Leases given to the attorney for the plaintiff showed more tenants, but it is because two or three of the locations had been occupied during that particular time by more than one tenant.

Defendant's Counsel: Will counsel concede those are leases of the building for the premises?

Plaintiff's Counsel: I would have to know the reason.

Defendant's Counsel: You have offered testimony as to [fol. 61] the nature of the business of some of the tenants. I wanted the Court to know the nature of the business of the remainder.

The Court: Offer them all in evidence. Then we have his testimony to support that.

Defendant's Counsel: May I do that, your Honor?

The Court: Yes, surely.

By the Court:

Q. Do you know how many there are in the bundle?

A. No, sir; I do not.

Defendant's Counsel: My only point in offering these in evidence is to show that under the purpose clause of this lease, a tenant was to occupy the building and was to store goods, and none of them granted the tenant the right to manufacture on the premises.

The Court: That is all right. That is to support his testimony.

Defendant's Counsel: Yes, sir.

By Defendant's Counsel:

Q. Mr. Davis, when Mr. O'Neil called at the bank did you read the release through to him that you handed him for his signature?

A. I showed him the release and told him its contents. I did not read it. I made it plain to him.

Q. What——

Plaintiff's Counsel: I object to that.

The Court: Overruled.

[fol. 62] Q. What did you say to him?

A. I explained contents of the paper he was to sign, stating it was to cover overtime and costs or anything arising out of his employment.

(Forty-seven (approximately) leases received and marked Defendant's Exhibit "B" in evidence.)

Cross-examination.

By Plaintiff's Counsel:

Q. When you mentioned 20 tenants, Mr. Davis, you were aware of the fact, were you not, that the Herman Furniture Company occupied four floors?

A. The Herman Furniture Company occupied three floors and basement.

Q. Of an eleven-story building?

A. Yes, sir.

Q. In other words, they occupied practically one-half of the building?

A. No, I wouldn't say four into eleven is one-half of the building.

Q. Steinberg Bros. had a whole floor?

A. They did.

Q. Dodd, Mead had a whole floor?

A. They did.

Q. You say you permitted no manufacturing at all in that building during the time in question in this case?

A. That is right.

Q. Did you ever go to those premises, visit the premises?

A. Sometimes twice a week, sometimes once a week.

Q. Did you ever go into Steinberg Bros.?

A. I have been in Steinberg's.

Q. Did you ever hear a machine going?

A. Best of my recollection, Steinberg had a little sewing machine down in the corner of their stockroom.

Q. Did you ever see it working?

A. I would not say I recall it working.

[fol. 63] Q. Never once?

A. I do not recall it ever working.

Q. They had a whole floor, glove manufacturers, and all that they had was one machine in the corner?

A. That is possible.

Q. That is a fact, according to your testimony?

A. That is all I recall, the machine in the corner of this stockroom.

Q. Do you remember Fuchs?

A. I do not recall Fuchs.

Q. Never in there?

A. I do not recall going in Fuchs's.

Q. But you remember those firms which did not manufacture?

A. Which did?

Q. Did not.

A. Which did not manufacture?

Q. Yes. In other words, Mr. Davis—I will withdraw that. Were you ever in the premises of Herman Furniture Company?

A. Yes.

Q. Did you ever see them finish up the furniture?

A. I believe they had a man down in the basement who did finish it, to take dirt and dust out of it.

Q. That is all?

A. That is all I recall?

Q. Did you ever see furniture in the raw?

A. I have seen it; it was made into furniture.

Q. Did you ever see it at Herman's before it was made into furniture?

A. I never saw any unpainted furniture, unvarnished.

Q. If you knew they were finishing any merchandise or assembling furniture, you would have had them evicted?

A. I do not consider that manufacturing.

Q. If you knew Steinberg was manufacturing, you would have evicted them?

A. I do not consider manufacturing anything Steinberg might have done on that one machine.

[fol. 64] And Fuchs—have you ever been in there at all?

A. I may have been in Fuchs's.

Q. Did you hear the girl testify that they made thousands of pairs of gloves a month?

A. On the premises?

Q. Yes.

A. I heard her testimony.

Q. But you never saw any manufacturing going on in there three years?

A. I cannot dispute her.

Q. Will you agree that they did manufacturing?

A. I will not agree to that.

Q. If you knew, you would have had them evicted?

A. I do not say we would have had them evicted.

Q. Is that a violation of one of the clauses of that lease?

A. We would have had a right at the landlord's option.

Q. Let's get down to the release. This man came into your premises. He told you he heard some of the men were getting paid, correct?

A. Right.

Q. That release was already drawn up at the time he came in, was it not?

A. No, I draw the release.

Q. Form release?

A. It was a form release, yes, sir.

Q. You notice in that release it says, "Whereas, there is a question between the parties as to the amount of hours worked by the plaintiff," was there any such question?

A. There was a question as to his right.

Q. Was there a dispute between you and Mr. O'Neil as to the amount of overtime hours he worked?

A. There was a discussion.

Q. Yes or no, Mr. Davis.

A. It could not be determined whether he had a right to the money or not.

[fol. 65] Plaintiff's Counsel: I move to strike it out.

The Court: Denied.

Q. At the time you had this conversation with Mr. O'Neil, did you explain to him that besides the overtime compensation he also had coming to him an additional similar amount for liquidated damages?

A. I explained to him——

Q. Yes or no, Mr. Davis.

A. It cannot be answered yes or no.

Q. Did you say one word during that entire conversation to indicate to Mr. O'Neil that if he had a valid claim, he could also collect an additional amount for liquidated damages besides the overtime compensation?

A. I explained to him this was a payment to be made to cover everything arising out of his employment.

By the Court:

Q. All claims that he might have?

A. Yes, sir.

Plaintiff's Counsel: That's all.

Redirect examination.

By Defendant's Counsel:

Q. In other words, Mr. Davis, you characterized to the plaintiff in this action what the release contained, what it covered, is that correct?

A. I did.

Q. You made no effort to conceal from him what his rights were in the matter, did you?

A. I told him that we did not want him to sign anything that we did not explain to him, therefore I explained the [fol. 66] importance of the paper that he was signing.

Defendant's Counsel: Defendant rests.

WILLIAM J. O'NEIL, plaintiff, recalled as a witness in rebuttal in his own behalf, testified as follows:

Direct examination.

By Plaintiff's Counsel:

Q. You heard Mr. Davis's testimony, did you not?
A. Yes, sir.
Q. When you came up to get that check, was there any discussion as he described?
A. There was, about my citizenship status. Otherwise, there was no discussion.
Q. Did he say anything to you that this is a general release, that you are releasing and waiving all your claims?
A. No, sir.
Q. Did he say anything to you about an item as liquidated damages?
A. No, sir.

Plaintiff's Counsel: That's all.
Defendant's Counsel: That is all.
Plaintiff's Counsel: Plaintiff rests.
The Court: The motions are renewed?

MOTION TO DISMISS COMPLAINT

Defendant's Counsel: Yes, sir. Your Honor, I respectfully renew my motion for a dismissal of the complaint upon the ground that the plaintiff has failed to establish facts sufficient to constitute a cause of action and also that the complaint be dismissed for the reason that the plaintiff released any claim for liquidated damages or counsel fees.

[fol. 67] DECISIONS ON MOTIONS

The Court: Decision reserved on the motion. Decision reserved on the case.
The Court: Plaintiff's motions denied. Defendant's motions granted.
Case closed.

DEFENDANT'S EXHIBIT A

Release signed by plaintiff.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT B

Approximately forty-seven leases.

(Omitted pursuant to stipulation.)

[fol. 68] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Appellant,

against

BROOKLYN SAVINGS BANK, Defendant-Respondent

STIPULATION RE EXHIBITS

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the exhibits in this case be submitted to the Court upon the argument or submission of this appeal in lieu of setting forth typewritten copies thereof in the within case on appeal.

Dated, New York, April 14th, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff-Appellant. Snedeker & Snedeker, Attorneys for Defendant-Respondent.

[fol. 69] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

WILLIAM J. O'NEIL, Plaintiff-Appellant,

against

BROOKLYN SAVINGS BANK, Defendant-Respondent

AFFIDAVIT OF NO OPINION

STATE, CITY AND COUNTY OF NEW YORK, ss.:

MAX R. SIMON, being duly sworn, deposes and says:

I am a member of the firm of Stein, Solomon & Simon, and am fully familiar with all the proceedings had herein.

That this cause was tried, without a jury, on the 15th day of March, 1943 before the Hon. William T. Keleher.

A decision, dismissing the complaint and ordering judgment for defendant-respondent was rendered on the 15th day of March, 1943.

That no opinion was handed down by the trial court.

Max R. Simon.

Sworn to before me this 13th day of April, 1943.
Jose M. Cuyar, Commissioner of Deeds.

[fol. 70] In Supreme Court of New York, Appellate Term, First Department

William J. O'Neil, Plaintiff-Appellant,

against

Brooklyn Savings Bank, Defendant-Respondent

Stipulation Waiving Certification and Settlement to Appellate Term

It Is Hereby Stipulated and Agreed that the foregoing, being all the papers upon which the judgment appealed from herein was entered, have all been filed in the office of the Clerk of the Municipal Court, Borough of Manhattan, First District, and are true copies of the summons, complaint, answer, decision, judgment, notice of appeal and stenographer's minutes herein, and that certification hereof by the Clerk is hereby waived and that consent is hereby given to the settlement of the within case on appeal without further notice.

Dated, New York, April 14, 1943.

Stein, Solomon & Simon, Attorneys for Plaintiff-Appellant. Snedeker & Snedeker, Attorneys for Defendant-Respondent.

[fol. 71] In Municipal Court of the City of New York, Borough of Manhattan, First District

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Notice of Appeal to Appellate Division

Sirs:

Please Take Notice that pursuant to the leave granted by the Appellate Term of the Supreme Court for the First Department in the above entitled action by an order duly made and filed in the office of the Clerk of that Court on July 7th, 1943 the above-named defendant hereby appeals to the Appellate Division of the Supreme Court First Department from the determination and order of the Appellate Term of the Supreme Court First Department entered herein in the office of the Clerk of the County of New York, on or about the 10th day of June, 1943, whereby it was adjudged that the judgment of the Municipal Court of the City of New York, Borough of Manhattan First District dismissing the complaint herein and awarding costs to the defendant in the sum of $41.00 be reversed with $30 costs to the plaintiff and directing judgment in favor of the plaintiff for $623.16 with interest on $423.16 from August 30th, 1940 and costs; and that said defendant appeals from each [fol. 72] and every part of said determination and order of the Appellate Term as well as from the whole thereof.

Please Also Take Notice that the defendant appeals and will bring up for review an order or judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District dated June 16th, 1943, and entered and filed in the office of the Clerk of said Court on said day, whereby it was adjudged that the plaintiff William J. O'Neil recover of the defendant Brooklyn Savings Bank the sum of $623.16 with interest of $70.89, making a total of $694.05, together with the sum of $115.50 costs and disbursements amounting in all to the sum of $809.55, and that the plaintiff have execution therefor, and from each

and every part of said order or judgment as well as from the whole thereof.

Dated, Brooklyn, New York, August 4th, 1943.

Yours &c., Snedeker & Snedeker, Attorneys for Defendant-Appellant, Office and P. O. Address, 164 Montague Street, Brooklyn, New York.

To: Stein, Solomon & Simon, Esqs., Attorneys for Plaintiff-Respondent, Office and P. O. Address, 225 West 34th Street, Borough of Manhattan, City of New York.

[fol. 73] In Supreme Court of New York, Appellate Term, First Department

11126/1943

William J. O'Neil, Plaintiff-Appellant,

against

Brooklyn Savings Bank, Defendant-Respondent

Order Granting Leave to Appeal to Appellate Division —Filed July 6, 1943

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr.

The above named defendant having by notice of motion dated the 24th day of June 1943, moved for leave to appeal to the Appellate Division, 1st Department, from the determination of the Appellate Term,

Now upon reading and filing said notice of motion and the affidavit of Sedgwick Snedeker, verified the 24th day of June 1943, in favor of said motion and the affidavit of Max R. Simon, verified the 28th day of June, 1943, in opposition thereto,

[fol. 74] It Is Ordered that said motion be and the same hereby is granted.

Enter:

W. C. H., Jr., Justice, Appellate Term, Supreme Court, First Dept.

Filed July 7, 1943,

N. Y. County Clerk's Office.

In Supreme Court of New York, Appellate Term, First Department

11126—1943. May #62 MC.

William J. O'Neil, Plaintiff-Appellant,

vs.

Brooklyn Savings Bank, Defendant-Respondent

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr., Justices.

Order of Reversal—Filed June 10, 1943

An appeal having been taken to this court by plaintiff [fol. 75] from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, 1st District, entered on the 16th day of March 1943, and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the judgment so appealed from be and the same is hereby reversed, with $30 costs, and judgment directed in favor of plaintiff for $623.16 with interest on $423.16 from August 30, 1940, and costs.

Enter:

B. L. S., Justice, Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 76] IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625—1943.

WILLIAM J. O'NEIL, Plaintiff,

against

BROOKLYN SAVINGS BANK, Defendant

JUDGMENT OF REVERSAL

Amount of judgment after trial as ordered and adjudged by the Appellate Term—First Department		$623.16
Interest on the sum of $423.16 from August 30th, 1940		70.89
	Total	$694.05
Costs on Reversal	$30.00	
Subpoena fees (8 subpoenas)	4.00	
Filing of Notice of Appeal	2.00	
Stenographer's Minutes	35.00	
Costs by Statute	40.00	
Service of Summons and Complaint	1.50	
Filing of Summons and Complaint	2.00	
Execution to Marshal	1.00	
		115.50
		$809.55

[fol. 77] STATE OF NEW YORK, CITY OF NEW YORK, County of New York, ss.:

MAX R. SIMON, being duly sworn, deposes and says that he is a member of the firm of Stein, Solomon & Simon, attorneys for the plaintiff in the above entitled action. That the disbursements above specified have been made in said action, and in the appeal heretofore taken herein by said plaintiff to the Appellate Term of the Supreme Court, First Department, or will necessarily be made or incurred therein; that a decision had been originally rendered after trial in favor of the defendant, but that the judgment based on said decision has been reversed, with $30.00 costs, by

the Appellate Term, First Department and judgment directed in favor of the plaintiff for $623.16 with interest on the sum of $423.16 from August 30th, 1940, and costs.

Max R. Simon.

Sworn to before me this 12th day of June, 1943. Jose M. Cuyar, Commissioner of deeds.

[fol. 78] Judgment entered the 16th day of June, 1943.

The summons and complaint in this action have been personally served on the Brooklyn Savings Bank, the defendant therein, on the 6th day of February, 1943, and a judgment entered herein on the 16th day of March, 1943, in favor of the defendant against the plaintiff after trial held on the 15th day of March, 1943, dismissing the complaint herein and awarding costs to the defendant in the sum of $41.00, and the plaintiff having duly appealed from said judgment to the Appellate Term of the Supreme Court, First Department, which, by order dated and entered therein the 10th day of June, 1943, ordered and adjudged that said judgment be reversed with $30.00 costs, and that judgment be directed herein in favor of plaintiff for $623.16 with interest on $423.16 from August 30th, 1940, and costs.

Now, on motion of Stein, Solomon and Simon, attorneys for the plaintiff, it is adjudged that the plaintiff, William J. O'Neil, do recover of the defendant, Brooklyn Savings Bank, the sum of $623.16 with interest of $70.89, making a total of $694.05, together with the sum of $115.50 costs and disbursements, amounting in all to the sum of $809.55, and that the plaintiff have execution therefor.

Robert Duffy, Clerk.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

#62 MC

May, 1943

WILLIAM J. O'NEIL, Plaintiff-Appellant,

v.

BROOKLYN SAVINGS BANK, Defendant-Respondent

Present: Hon. Bernard L. Shientag, Hon. Charles B. McLaughlin, Hon. William C. Hecht, Jr., Justices.

Appeal by plaintiff from judgment of the Municipal Court of the City of New York, Borough of Manhattan, 1st District, entered upon decision of justice in favor of defendant.

Stein, Solomon & Simon (Max R. Simon, of counsel) for appellant. Snedeker & Snedeker (Sedgwick Snedeker, of counsel) for respondent.

PER CURIAM:

The proofs show that plaintiff was employed in the production of goods for commerce within the meaning of [fol. 80] the Fair Labor and Standards Act, and entitled to recover liquidated damages in the sum of $423.16 by reason of defendant's default in making overtime payments as directed therein. The sum of $200 is fixed as a reasonable attorney's fee.

Judgment reversed, with $30 costs, and judgment directed in favor of plaintiff for $623.16 with interest on $423.16 from August 30, 1940, and costs.

All concur.

Filed.

[fol. 81] In Supreme Court of New York, Appellate Division—First Department

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Stipulation as to Exhibits

It is hereby stipulated and agreed that defendant's exhibits A, release signed by plaintiff and B, approximately forty-seven leases, which were received and marked in evidence on the trial of this action be and the same are hereby omitted from the printed record and that a statement be printed in lieu thereof.

Dated, New York, October 5, 1943.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 82] Stipulation Waiving Certification to Appellate Division

[Same Title]

It is hereby stipulated and agreed by and between the attorneys for the respective parites hereto that the foregoing are true and correct copies of the Record on Appeal to the Appellate Term, First Department; the Order of Reversal; the Judgment of Reversal and the Notice of Appeal to the Appellate Division, First Department, all of which are on file in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, as well as the Opinion of the Appellate Term, First Department and the order of said Court allowing the appeal, which are on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated, New York, October 5, 1943.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 83] IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN—FIRST DISTRICT

1625—1943

[Same Title]

NOTICE OF APPEAL TO COURT OF APPEALS

SIR:

Please take notice that pursuant to leave granted by the Appellate Division of the Supreme Court, First Department, by order dated February 25, 1944 and filed that day in the office of the Clerk of that court, the defendant in the above entitled action hereby appeals to the Court of Appeals of the State of New York from the judgment in the above entitled action in favor of the plaintiff and against the defendant in the sum of $908.83 entered upon the order herein of the Appellate Division of the Supreme Court, First Department in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, on the 8th day of February, 1944 modifying and affirming the final judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District entered in the office of said Clerk on the 16th day of June, 1943 upon the order of reversal of the Supreme Court of the State of New York, Appellate Term, First Department dated June 10, 1943 in favor of the Plaintiff-respondent and against the Defendant-appellant in the sum of $809.55, and the defendant appeals from each and every [fol. 84] part of said judgment of modification and affirmance as well as from the whole thereof.

Dated February 28, 1944.

Snedeker and Snedeker, Attorneys for Defendant-appellant, Office & P. O. Address, 164 Montague Street, Brooklyn, New York.

To Max R. Simon, Esq., Attorney for Plaintiff-respondent, Office & P. O. Address 225 West 34th Street, New York City.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Same Title]

ORDER GRANTING LEAVE TO APPEAL TO COURT OF APPEALS—February 25, 1944

Present Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

The above-named defendant having moved for leave to appeal to the Court of Appeals from the judgment entered [fol. 85] on the order of this Court entered herein on the 11th day of January, 1944, or for a reargument of the appeal herein, and for a stay of all proceedings on the part of the plaintiff under said judgment pending said appeal.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Sedgwick Snedeker in support of said motion, and the affidavit of Max R. Simon in opposition thereto, and after hearing Mr. Sedgwick Snedeker for the motion, and Mr. Max R. Simon opposed.

It is hereby ordered that the said motion for leave to appeal and for a stay be and the same hereby is granted, and this court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

And it is further ordered that the said motion for reargument be and the same is hereby denied.

Enter, F. M.

[fol. 86] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

[Same Title]

ORDER OF MODIFICATION AND AFFIRMANCE, APPEALED FROM—December 21, 1943

An appeal having been taken to this Court by the defendant from a determination of the Supreme Court, Appellate Term, entered on or about the 10th day of June, 1943, reversing a judgment of the Municipal Court of the City

of New York, Borough of Manhattan, First District, in favor of the defendant, and directing judgment in favor of plaintiff; and the said appeal having been argued by Mr. Sedgwick Snedeker, of counsel for the appellant; by Mr. Max R. Simon of counsel for the respondent; and briefs having been filed by Mr. Robert R. Bruce of counsel for Realty Advisory Board on Labor Relations, Incorporated; and by Mr. Joseph V. Lane, Jr., of counsel for the Mutual Life Insurance Company of New York as amici curiae; and due deliberation having been had thereon, it is

Ordered and adjudged that the determination of the Appellate Term and the judgment entered thereon, so appealed from, be and the same hereby are modified, on [fol. 87] the law and facts, by providing that the allowance of $200 as counsel fee be reduced to the sum of $100 for services heretofore rendered herein, in addition to a counsel fee of $50 for services rendered on this appeal; and that the respondent recover of the appellant the costs of this appeal; and that as so modified the said determination and judgment entered thereon be and the same hereby are affirmed.

In Municipal Court of the City of New York, Borough of Manhattan—First District

Index No. 1625—1943

[Same Title]

Judgment

Amount of judgment as modified by order of Appellate Division—First Department		$709.55
Amount awarded by Appellate Division—First Department as attorney's fee for services rendered on appeal thereto	$50.00	
Amount paid for printing respondent's brief and respondent's reply brief in Appellate Division	89.28	
Appeal to Appellate Division before argument	20.00	
Appeal to Appellate Division for argument	40.00	199.28
		$908.83

[fol. 88] STATE OF NEW YORK,
City of New York,
County of New York, ss:

Max R. Simon, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above action. That the disbursements above specified have been made in an appeal that was taken herein by the defendant to the Appellate Division—First Department, or that will necessarily be made or incurred therein; that a judgment in the sum of $809.55 was heretofer entered herein on June 16, 1943 in favor of plaintiff and against the defendant; that the Appellate Division made an order directing that said judgment be reduced and modified to the sum of $709.55, and that, as so reduced and modified, the same be affirmed with costs and wherein it was further directed that plaintiff be awarded the additional sum of $50.00 as a reasonable attorney's fee for services rendered on said appeal to the Appellate Division.

Max R. Simon.

Sworn to before me this 3rd day of February, 1944.
Jose M. Cuyar, Comm. of Deeds, N. Y. C.

Judgment entered the 8th day of February, 1944.

[fol. 89] A judgment having been heretofore duly entered herein on June 16, 1943 in favor of plaintiff and against the defendant in the sum of $809.55,—and the defendant having taken an appeal from said judgment to the Appellate Division—First Department which made an order directing that said judgment be reduced to the sum of $709.55, and that, as so reduced and modified, the same be affirmed with costs, and further directing that the plaintiff be awarded herein the additional sum of $50.00 as a reasonable attorney's fee for services rendered on said appeal.

Now, on motion of Max R. Simon, attorney for the plaintiff, it is

Adjudged, that plaintiff, William J. O'Neil, do recover of the defendant, Brooklyn Savings Bank, the sum of $709.55 together with the sum of $199.28 costs and disbursements, amounting in all to the sum of $908.83, and that the plaintiff have execution therefor.

Albert Sullivan, Clerk.

[fol. 90] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

November, 1943.

Alfred H. Townley, Edward J. Glennon, Irwin Untermyer, Edward S. Dore, Joseph M. Callahan, JJ.

13696

[Same Title]

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Sedgwick Snedeker, of counsel (Snedeker & Snedeker, attorneys) for appellant.

Max R. Simon for respondent.

Robert R. Bruce, of counsel (John J. Boyle with him on the brief; McLanahan, Merritt & Ingraham, attorneys) for Realty Advisory Board on Labor Relations, Incorporated, as amicus curiae.

Joseph V. Lane, Jr., of counsel (Vincent Keane with him on the brief; Louis W. Dawson, attorney) for The Mutual Life Insurance Company of New York, amicus curiae.

OPINION

[fol. 91] *Per Curiam:*

We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it. As was said in Peter Rigopoulos et al. *v.* Kervan, — U. S. C. C. A., —, "We see no escape from the statutory language."

Under the circumstances of this case, however, especially in view of the small amount involved and that costs will be awarded to the plaintiff, we think a counsel fee of $100 for services heretofore rendered, in addition to a counsel fee of $50 for services rendered on this appeal, is fair and reasonable. The determination of the Appellate Term and the judgment entered thereon should be modified accord-

ingly and, as so modified, affirmed with costs of this appeal, to the respondent.

[fol. 92] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

November, 1943

Alfred H. Townley, Edward J. Glennon, Irwin Untermyer, Edward S. Dore, Joseph M. Callahan, JJ.

13696

[Same Title]

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Sedgwick Snedeker, of counsel (Snedeker & Snedeker, attorneys) for appellant.

Max R. Simon for respondent.

Robert R. Bruce, of counsel (John J. Boyle with him on the brief; McLanahan, Merritt & Ingraham, attorneys) for Realty Advisory Board on Labor Relations, Incorporated, as amicus curiae.

Joseph V. Lane, Jr., of counsel (Vincent Keane with him on the brief; Louis W. Dawson, attorney) for The Mutual Life Insurance Company of New York, amicus curiae.

[fol. 93] CALLAHAN, J. (Dissenting):

Plaintiff was employed as a night watchman in an eleven-story business building located at 443 Fourth Avenue, New York, N. Y., from November 5, 1938, to May 3, 1940. Two years after leaving his employment he met a friend who had been a fellow worker in the building and who told him that one of the defendant's officers wished to see plaintiff as he had a check for him (plaintiff). When plaintiff called on defendant he was told that a check for $423.16 for overtime wages had been waiting for him, but that defendant had been unable to locate plaintiff. The plaintiff accepted the check and signed a general release, after that paper had been explained to him. The release recited that

there was uncertainty as to whether plaintiff had any enforcible claim under the Fair Labor Standards Act, that due, if any, was difficult of ascertainment, and that the parties desired to settle the claim by payment of the sum mentioned.

Concededly the amount paid was the full amount of plaintiff's claim for overtime wages.

Some time after the receipt and acceptance of these wages, plaintiff commenced the present action in the Municipal Court to recover an additional $423.16 for liquidated damages, and an attorney's fee.

Upon the trial of the action in the Municipal Court there was a dispute as to whether the tenants in 443 Fourth Avenue were engaged in producing goods for commerce.

It appeared that there were twenty lofts in the building which had been rented to 27 different tenants during the [fol. 94] period of plaintiff's employment.

Plaintiff called as witnesses employees who testified that nine of these tenants had been engaged in activities which plaintiff claimed showed production of goods for interstate commerce.

Defendant's real estate officer testified that the leases in force during the period of plaintiff's employment provided for the use of the rented space for showroom and office purposes, with covenants against any manufacturing in the premises.

The Municipal Court found in favor of defendant, and dismissed the complaint, thus resolving the disputed issues of fact in defendant's favor. Upon appeal to the Appellate Term, that court reversed the judgment of the Municipal Court, stating that the proof showed that plaintiff was employed in the production of goods for commerce and was, therefore, entitled to recover an additional $423.16 for liquidated damages. It fixed the sum of $200 as a reasonable counsel fee, and adjudged that said sum be paid to the plaintiff.

It thus appears that at the time when the compensation was paid and the release executed, and in fact throughout the present litigation there has been a dispute as to whether the statute (Fair Labor Standards Act, Section 16, subdivision b; 29 U. S. C. A. §216, subdivision b) applied to plaintiff, or afforded him any benefits. This dispute did not involve merely a controversy as to the construction of

the law but involved federal issues as well, concerning the nature of the activities of the tenants occupying space in [fol. 95] the commercial building in which plaintiff worked.

There would seem to be ample consideration for an accord and satisfaction or for a general release, under the circumstances noted. Nevertheless, this court is about to hold that the liquidated damages may be recovered and some attorney's fee must be paid to plaintiff, even though he received his full compensation before suit and gave a general release. The basis of this decision is that the statute and the public policy declared by it prevent any settlement of the claim for liquidated damages. In other words, such damages are collectible because the overtime wages were not paid concurrently with regular wages. This strange and harsh doctrine should not be promulgated unless it is clear that the statute intended such a rule.

The statute in question reads as follows:

"Section 16. Penalties; civil and criminal liability

. . . . . .

(b) Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or [fol. 96] employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition, to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

It is to be noted that the section imposes liability for liquidated damages only on an employer who "violates the provisions of section 6 or section 7." Here, the employer has paid the overtime wages to the last penny. It paid the same voluntarily and, in fact, without any prior

demand therefor by the employee. The theory on which plaintiff's claim for the liquidated damages rests is that the courts are to imply a requirement under section 7 that the overtime be paid at the end of each week. Delay of any kind is said to make the payment of liquidated damages mandatory and beyond release, even where no legal action is required for the collection of the overtime compensation. But the section quoted says that an "Action to recover such liability may be maintained," etc. "Such liability" no doubt refers to overtime compensation and liquidated damages. It seems to me, therefore, that the liability for damages only arises when an action has been made necessary to collect the compensation. The statute does not say that it shall be deemed to have been violated if the employer fails to pay the overtime compensation with the regular wages.

It is not contended that an attorney's fee would be collectible where no action was necessary. It would seem likewise the intention that the right to damages was de- [fol. 97] pendent on the necessity for bringing suit.

The question is one of statutory construction, and we are endeavoring to ascertain Congressional intent. The Fair Labor Standards Act was adopted after conflicting bills had been passed by the House and the Senate comprising the Seventy-fifth Congress. A conference committee was thereupon appointed and the conferees prepared the bill which was finally adopted. Neither of the original bills contained any provision similar to Section 16, as found in the final bill. In fact, a provision in one of the original bills forbidding any contract waiving any of the benefits under the law was omitted from the final bill, and Section 16 substituted as a section to aid enforcement.

We may be best enlightened as to the meaning intended by the language found in the final bill by examining the statements of the conferees to Congress as to their purpose in inserting the new section. In explaining Section 16, Representative Keller, one of the conferees, said:

> "If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in

addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fee and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit" (83 Cong. Record, p. 9264).

[fol. 98] Surely, Representative Keller did not understand that employees would have the right to liquidated damages unless they were compelled to sue for their compensation. He did not say that delay of payment was to be the basis for liability, but said that failure to pay and the necessity for suit were to be the conditions creating the penalty. Nothing has been called to our attention from the debates, to show that any member of Congress gave the section a different meaning. If, contrary to the views expressed by Representative Keller, delay in payment is to be substituted for failure of payment and the necessity of suit as the condition creating double liability, surely more apt language could have been found to express that intention. Under the construction now proposed, no employer would be safe unless he decided correctly, and on each current payday the precise amount of compensation due, despite all the conflicting issues that frequently arise affecting such rights.

The difficulty which arises in determining the question as to whether the Fair Labor Standards Act applies to maintenance employees in business buildings may be illustrated by a brief reference to the decisions affecting that question. The courts have determined that the application of the Act depends on the employes' activities (Kirschbaum Co. *v.* Walling, 316 U. S. 517; Warren-Bradshaw Co. *v.* Hall, 317 U. S. 88; Walling *v.* Jacksonville Paper Co., 317 U. S. 564; McLeod *v.* Threlkeld, 319 U. S. 491). But as the Act applies to employees in two categories, i.e., those engaged in commerce, and those engaged in producing goods for commerce (apparently with a broader base for liability in the latter class of employment), a distinc[fol. 99] tion has been made between maintenance employees where the tenants in the buildings are engaged in the first rather than the second category (Kirschbaum Co. *v.* Walling, supra; Stoike *v.* First National Bank, 290 N. Y. 19). This distinction arises because the statutory definition of "production of goods for commerce" covers employees "in any process or occupation necessary to the production

thereof" and thus includes maintenance employees, whereas, in so far as the statute applies to those engaged in commerce, the definition is narrower. As to the latter class, the test appears to be whether they are actually in, or so closely related to, the movement of the commerce as to be part of it (McLeod v. Threlkeld, supra).

Because of the distinction above noted, the employer who maintains a business building has many confusing issues to determine before he can ascertain whether his maintenance employees are covered by the Act. First, he must inquire into the activities of his various tenants and determine whether they are engaged in intrastate or interstate commerce. If in the latter, whether they are engaged directly in such commerce or in producing goods for commerce. In addition, there is the question of the character of the maintenance employee's work and how closely it is related to the tenants' activities, with a different basis for liability where the tenants are producing goods for commerce than in the case where they are in the commerce itself. Tenants may change from month to month, or tenants holding over may change their activities. The employer would not know even now (at least not from any authoritative decisions of the courts) whether liability de-
[fol. 100] pended on the number of tenants who were engaged in one activity or the other and, if so, what percentage was to control. Is there any wonder that the problem presented has been compared to "an attempt to square the circle"? (Kirschbaum Co. *v.* Walling, supra.)

To add to this confusion, as the law is now to be interpreted, all of these conflicting questions must be settled, and settled correctly, on each payday, with a liability for double payment if the employer delays one day to inquire into the facts. If this is the proper construction of the Act, then we may well ponder whether it is one "to help those who toil in factory and on farm" to obtain "a fair day's pay for a fair day's work," as the Presidential Message stated in recommending the legislation, or one to aid litigious clients and their lawyers.

We are told that public policy compels the construction now being laid down. What about the policy of the law which favors settlement of disputes?

It is quite true that the federal courts have held, and we have agreed, that under the Fair Labor Standards Act an employer may not pay his employee less than the full

amount of overtime wages prescribed by the statute without remaining liable for liquidated damages (Seneca Coal & Coke Co. *v.* Lofton, 136 Fed. 2d 359; Certiorari denied October 18, 1943; Campbell *v.* Mandel Auto Parts Corp., 264 App. Div. 701).

It is likewise true that the fact that the employer's problem is perplexing does not warrant a shifting of his burden to the employee (Overnight Motor Co. *v.* Missel, 316 U. S. 572).

[fol. 101] In that case, in upholding the constitutionality of the provision for liquidated damages, the Supreme Court of the United States said that such provision was one for compensation, and not a penalty. There was, however, no holding in that case as to when the liquidated damages accrued or were payable.

I advocate no construction of the statute which would sanction release of the employer from liability for damages where he pays less than the full amount of statutory compensation, nor do I advocate any shifting of the burden presented from the employer to the employee.

The statute has specified no time when the overtime wages must be paid. The intention to permit a reasonable time for payment should be inferred. What is a reasonable time is a relative matter. Accordingly, the employee should be permitted to accept the payment at the time it is offered and waive or release any claim of unreasonable delay.

It is one thing to say an employee may not bargain away his rights to compensation under the Act, and it is quite another to say that he cannot release his right to resort to court for his liquidated damages when his compensation has been paid to him in full. The courts of this State have sanctioned a release by an injured workman of a claim under the Workmen's Compensation Law (O'Brien *v.* Lodi, 246 N. Y. 46), and a waiver of minimum wage legislation (Ryan *v.* City of New York, 177 N. Y. 271; see, however, Campbell *v.* City of New York, 244 N. Y. 317). They have permitted an obligor to waive the benefit of the [fol. 102] right to deficiency judgment (City Bank Farmers Trust Co. *v.* McConnell, 284 N. Y. 686). But now we are about to say, although the Federal courts disagree on the question (Guess *v.* Montague, U. S. Cir. Ct. App. 4th Cir., September 16, 1943; Rigopoulos *v.* Kervan, 47 Fed. Supp.

576 [S. D. N. Y. 1942]), that a workman may not accept his full overtime compensation on any date after a current payday and give acquittance for liquidated damages.

I dissent and vote to reverse the determination and order of the Appellate Term and to affirm the judgment of the Municipal Court.

Glennon, *J.*, concurs.

[fol. 103] In Court of Appeals of New York

William J. O'Neil, Plaintiff-Respondent,

against

Brooklyn Savings Bank, Defendant-Appellant

Stipulation as to Exhibits

It is hereby stipulated and agreed that Plaintiff's Exhibits A, being a release signed by the plaintiff and B, being approximately 47 leases which were received and marked in evidence at the trial of this action be and the same hereby are omitted from this printed record on appeal.

It is further stipulated and agreed that these exhibits may be handed up to the Court at the time of argument or be referred to in briefs of the parties with the same force and effect as if fully incorporated herein.

Dated: New York, N. Y., March 6, 1944.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 104] Stipulation Waiving Certification of Record to the Court of Appeals

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing are true and correct copies of the record on appeal to the Appellate Division, First Department; the order of modification and affirmance, the judgment, the notice of appeal to the Court of Appeals all of which are on file

in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, the Per Curiam opinion of the Appellate Division, First Department and the dissenting opinion of Mr. Justice Callahan, and the order of said Court allowing the appeal, which are on file with the Clerk of said Court.

Certification of all of the foregoing papers is hereby waived.

Dated: New York, N. Y., March 6, 1944.

Snedeker & Snedeker, Attorneys for Defendant-Appellant. Max R. Simon, Attorney for Plaintiff-Respondent.

[fol. 105] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of June in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur June 14, 1944.

[fol. 106] WILLIAM J. O'NEIL, Respondent,

against

BROOKLYN SAVINGS BANK, Appellant

Be It Remembered. That on the 7th day of March in the year of our Lord one thousand nine hundred and forty-four, Brooklyn Savings Bank, the appellant in this cause, came hereunto the Court of Appeals, by Snedeker & Snedeker, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William J. O'Neil, the respondent in said cause, afterwards appeared in said Court of Appeals by Max R. Simon, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 107] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Sedgwick Snedeker, of counsel for the appellant; and by Mr. Max R. Simon of counsel for the respondent; briefs filed by amici curiae; and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs, without prejudice to an application in the trial court for reasonable attorney's fee for services rendered upon an appeal.

We do not pass on the question whether the counsel fee heretofore granted is subject to increase for services rendered upon an appeal.

Two questions involving the construction of the Fair Labor Standards Act of 1938 and a question under the Federal Constitution were duly presented and necessarily passed upon by this Court. The defendant contended:

1. That an action may not be maintained under Section 16 (b) of the Act by an employee solely for the recovery of liquidated damages when it is admitted that all overtime compensation was voluntarily paid in full by the employer prior to the institution of suit.

2. That the release of all further claims and damages under the Fair Labor Standards Act executed by the [fol. 108] employee and delivered to his employer at the time he received payment of all overtime compensation due him under the Act is a good defense to an action subsequently brought by such employee solely to recover liquidated damages.

3. That the imposition of liquidated damages deprives an employer of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

This court held against the defendant on each of these three contentions and unanimously affirmed a judgment in favor of the plaintiff.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Municipal Court of The City of New York there to be proceeded upon according to law.

[fol. 109] Therefore, it is considered that the said judgment be affirmed, with costs, etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Municipal Court of The City of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Municipal Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 14, 1944:

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (State of New York, Court of Appeals Seal.)

[fol. 110] At a Special Term, Part II of the Municipal Court of the City of New York, Borough of Manhattan, First District, held in the Court House at No. 8 Reade Street, Borough of Manhattan, City of New York, on the 17th day of August, 1944.

Present: Hon. Charles A. Curtin, Justice.

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,

against

BROOKLYN SAVINGS BANK, Defendant

ORDER

Upon reading the Remittitur of the Court of Appeals of the State of New York dated June 14, 1944, heretofore filed herein, and the affidavit of Max R. Simon sworn to the 17th day of August, 1944, hereto annexed, and on all the papers and proceedings herein and due deliberation having been had, it is

Ordered that the order of the Court of Appeals of the State of New York dated June 14, 1944, be and the same hereby is made the order of this Court.

Enter

Charles A. Curtin, J. M. C.

[fol. 111] MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,
against
BROOKLYN SAVINGS BANK, Defendant

STATE OF NEW YORK,
County of New York, ss:

Max R. Simon being duly sworn deposes and says: that he is the attorney for the plaintiff herein; that an appeal was heretofore taken by the defendant to the Court of Appeals of the State of New York from a certain judgment heretofore entered herein on February 8, 1944; that by order dated June 14, 1944 the Court of Appeals of the State of New York unanimously affirmed with costs the judgment so appealed from and remitted to this court its order and judgment to be enforced according to law;

Wherefore plaintiff prays for an order making the order of the Court of Appeals of the State of New York the order of this Court.

That no previous application has been made for the relief now sought herein.

Max R. Simon.

Sworn to before me this 17 day of August, 1944.
Morris Rudman, Asst. Clerk, First Dist., Municipal Court, Manhattan.

[fol. 112] MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, FIRST DISTRICT

Index No. 1625/1943

WILLIAM J. O'NEIL, Plaintiff,
against
BROOKLYN SAVINGS BANK, Defendant

FINAL JUDGMENT

Amount stipulated as a reasonable attorney's fee in the Court of Appeals in accordance with stipulation dated July 31, 1944	$100.00

Appeal to Court of Appeals before argument	$30.00	
Appeal to Court of Appeals for argument	60.00	
Court of Appeals term fees	10.00 (more than one term)	
Amount paid for printing plaintiff's points on appeal (Main brief and reply brief) in Court of Appeals	127.11	
Amount paid for remittitur from Court of Appeals	3.15	
Execution to Marshal	1.00	231.26
Total		$331.26

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Max R. Simon, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above action. That the disbursements above specified have been made [fol. 113] in an appeal that was taken herein by the defendant to the Court of Appeals, or that will necessarily be made or incurred therein; that a judgment in the sum of $809.55 was heretofore entered herein on June 16, 1943 in favor of plaintiff and against the defendant; that the Appellate Division made an order affirming, but modifying, said judgment, and that, as so modified judgment was thereafter duly entered herein on the 8th day of February, 1944, in favor of the plaintiff and against the defendant in the sum of $908.83; that thereafter said defendant appealed from said judgment to the Court of Appeals which, after due deliberation, made an order directing that said judgment be affirmed, with costs; that the Court of Appeals further directed that any application for an attorney's fee in the Court of Appeals be made in the Trial Court and that the respective parties hereto, in lieu of making such an application mutually agreed by stipulation dated July 31, 1944, that the plaintiff be awarded the sum of $100.00 for an attorney's fee in the Court of Appeals. By

order of this Court dated August 17, 1944, the order of the Court of Appeals of the State of New York was made the order of this Court.

Max R. Simon.

Sworn to before me this 17th day of August, 1944.
Morris Rudman, Asst. Clerk, First Dist., Municipal Court, Manhattan.

[fol. 114] Judgment entered the 17th day of August, 1944. A judgment having been heretofore duly entered herein on February 8, 1944 in favor of plaintiff and against the defendant in the sum of $908.88, and the defendant having taken an appeal from said judgment to the Court of Appeals which, after due deliberation, directed and ordered that said judgment be affirmed with costs. And the order of the Court of Appeals of the State of New York having been made the order of this Court by order dated August 17, 1944,

Now on motion of Max R. Simon, attorney for the plaintiff, it is

Adjudged that the judgment heretofore entered herein on February 8, 1944 in favor of the plaintiff and against the defendant in the sum of $908.83 upon the order of the Appellate Division be and the same hereby is affirmed;

Adjudged that the plaintiff William J. O'Neil do recover of the defendant The Brooklyn Savings Bank the sum of $100 as a reasonable attorney's fee for the conduct of the appeal in the Court of Appeals together with the sum of $231.26 costs and disbursements on said appeal amounting in all to the sum of $331.26 and that the plaintiff have execution therefor.

Albert Sullivan, Clerk.

[fol. 115] No. 86122

William J. O'Neil vs. Brooklyn Savings Bank

Index No. 1625, Year 1943

STATE OF NEW YORK,
City of New York,
County of N. Y., ss:

I, Albert Sullivan, Clerk of the Municipal Court of the City of New York, Borough of Manhattan, First District, do certify that I have compared the preceding with the original record on appeal to Court of Appeals and subsequent proceedings in this cause on file in my office and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of this Court this 21 day of August, 1944.

No. of Folios 2240. Fee. $22.40.

Albert Sullivan, Clerk.

B. Salzman (Name of person receiving fee).

(3604)

[fol. 116] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 6, 1944

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted limited to the second question presented by the petition for the writ and the case is transferred to the summary docket. The Solicitor General is invited to file a brief *amicus curiae* if so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48898 New York, Court of Appeals Term No. 445. Brooklyn Savings Bank, Petitioner, vs. William J. O'Neil. Petition for writ of certiorari and exhibit thereto. Filed September 8, 1944. Term No. 445 O. T. 1944.